



In re Estate of Francis Kipkoeh Cheptoo alias Kimoso (Deceased) (Succession Cause E036 of 2024) [2024] KEHC 12138 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E036 OF 2024
RN NYAKUNDI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF FRANCIS
KIPKOECH CHEPTOO ALIAS KIMOSO (DECEASED)**

BETWEEN

MAURICE KIPCHUMBA KIMOSO 1ST APPLICANT

JANE JELAGAT KIMOSO 2ND APPLICANT

AND

AMOS CHERUIYOT TAIWA RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion application dated 24th May 2024 premised under Order 51 rule 1 of the [Civil Procedure Rules](#), section 1A, 1B and 3A, 63(C), (e) of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Orders 40 Rules 1, 2 & 4, section 47 of the [Law of Succession Act](#), Rule 73 of the [Probate and Administration Rules](#), Article 159 of the [Constitution](#) of Kenya 2010 where the Applicants are seeking orders as follows:
 1. Spent
 2. That pending hearing and determination of this application this Honourable Court be pleased to issue an order of injunction restraining the Applicant, one Amos Cheruiyot Taiwa his agents, employees, personal representatives or any person acting at his from entering, cultivating, ploughing, planting or otherwise interfering, or dealing in any manner with that parcel of land known as Karuna/Karuna Block 3 (Imani Farm) which forms part of the deceased estate.
 3. That pending conclusion of succession proceedings with regard to the estate, this Honourable Court do issue an order preserving the estate and barring one Amos Cheruiyot Taiwa his



agents, employees, personal representatives or any person acting at his behest from interfering, cultivating or dealing in any manner with the land known as Karuna/Karuna Block 3 (Imani Farm) which forms part of the deceased estate.

4. That there be an order maintaining the status quo in that the Applicants continue to superintend, manage or otherwise protect the deceased's estate as was agreed by the family in a meeting held on 14th December 2013 until the estate shall have finally been administered.
2. The application is based upon the grounds on the face of it among others: that Amos Cheruiyot Taiwa, whilst misrepresenting that he had orders from this court issued to him on 12th April 2024 forcefully entered into Karuna/Karuna Block 3 Imani in possession and use by the Applicants and planted an already ploughed and harrowed land; that the said Karuna/Karuna Block 3 Imani has over the years benefitted from the protection and good husbandry of the Applicants herein in their role as holders of limited grants to preserve the estate and the Respondent on the other hand has been nothing but a destructive force, selling of vast properties and squandering the proceeds thereof to the detriment of the estate and even his own children who will likely be left without an inheritance; that the said Karuna/Karuna Block 3 Imani has been under the Applicant's management and protection pursuant to an agreement by the family by which the Respondent was also granted possession and use of other assets of the estate but which the Respondent has sold off and now wants to find a way to enable him sell off Karuna/Karuna Block 3 Imani and that Amos Cheruiyot Taiywa lied to the Respondents and the police that this court had allowed him to enter into the said land and plough it.
 3. The application is supported by the affidavit sworn by the 1st Applicant dated 24th May 2024 in which he deposes as follows;
 1. That the deceased, one Francis Kipkoech Cheptoo Alias Kimoso died on 18th November 2012.
 2. That the deceased, had two (2) wives namely Magdalene Francis (1st Wife) and Catherine Jepyator Francis (2nd wife).
 3. That the 1st wife's house had the following dependants:
 - a. Magdalene Francis 1st Wife (now deceased)
 - b. Maurice Kipchumba Kimoso Son (1st Applicant herein)
 - c. Robert Kiplimo Kimoso Son
 - d. Christopher Kimoso Son
 - e. Margaret Kimoso Daughter
 - f. Raymond Biwott Kimoso Son
 - g. Carolyne Kimoso Daughter
 - h. Grace Kimoso Daughter
 - i. Charity Kimoso Daughter
 - j. Kiptanui Kimoso Son
 - k. Kenneth Kimoso Son
 4. That in the 2nd wife's house, the following were left as dependants:
 - a. Catherine Francis Kimoso 2nd Wife (now deceased)



- b. Jane Jelagat Kimoso Daughter (2nd Applicant herein)
 - c. Abraham Kipkosgei Kimoso Son
 - d. Mark Chirchir Kimoso Son
 - e. Luka Korir Kimoso Son
 - f. Nicholas Kiprop Kimoso Son
 - g. Amos Taiwa Kimoso Son
 - h. Judy Kimoso Daughter
 - i. Ruth Jemeli Kimoso Daughter
5. That when or father died, it was revealed to us by one Christopher Arap Mitei Advocate that he had prepared a will in relation to his estate which will was done on 12th July 2011.
6. That in accordance therewith, a meeting was held on 14th December 2013 where all members of the 2 houses were invited and the following persons attended: -
- 1st house
- a. Maurice Kipchumba Kimoso
 - b. Robert Kiplimo
 - c. Margaret Kimoso
 - d. Raymond Biwot Kimoso
 - e. Kenneth Kimoso
 - f. Kiptanui Kimoso
- 2nd House
- a. Jane Jelagat Kimoso
 - b. Abraham Kipkosgei Kimoso
 - c. Mark Kipchirchir Taiwa
 - d. Luka Korir Kimoso
 - e. Nicholas Kiprop Kimoso
 - f. Amos Cheruiyot Taiwa
 - g. Judy Jepkoech Kimoso
 - h. Ruth Jemeli Kimoso
7. That in attendance were also the following:
- a. Mr. Joseph Yatich
 - b. Mr. Michael Kwambai
 - c. F. Keitany- Assistant Chief



- d. Salina- our aunt (now deceased)
 - e. Tapkurgoi- our aunt
 - f. Tapsimie- our want
8. That the following elders were also in attendance as witnesses
 - a. Gabriel Akwai
 - b. Raphael Chebet
 - c. James Barsulai (now deceased)
 - d. Paul Kimuge
 9. That the family lawyer, one Christopher Arap Mitei read out the will on the said date.
 10. That we learnt that the executors of the will were Joseph Yatich and Michael Kwambai who were also in attendance.
 11. That following the reading of the will it was decided that the same be filed in court for probate purposes.
 12. That our advocate filed High Court Succession Cause No. E139 of 2023, which as it turns out was actually a petition for grant of letters of administration intestate.
 13. That following the reading of our father's will, it was agreed that all beneficiaries can take possession of and use, but not dispose of the assets bequeathed to them pending probate of the will.
 14. That as a matter of fact, Amos Taiywa took over the assets that had been bequeathed to him per the will.
 15. That contrary to the agreement, Amos Taiywa immediately embarked on a mission of wanton wastage and depletion of the estate by selling or otherwise disposing of the assets/
 16. That this forced me to take out a special grant to preserve the estate pending its distribution in Ad Litem Succession Cause No. 252 of 2020 which was issued on 27th July 2020.
 17. That though the Respondent is from the 2nd house, his bona fides as my father's son are questionable and my father even indicated his doubts as much.
 18. That my father had distributed assets to both houses and the Respondent having depleted what was given to him is now intent on harassing those of us who have protected the remaining part of the estate.
 19. That the Respondent sold Karuna/SOSIANI Block 2/216 and Karuna/SOSIANI Block 2/217 in the year 2013. This is the land that his brothers Luka and Abraham had been living in before our father's death. When our father died, Amos Taiywa demolished the houses on the 2 parcels before selling them off, rendering his own brothers homeless.
 20. That the Respondent has sold off part of Karuna/SOSIANI Block 2/145 and Karuna/SOSIANI Block 2/147.
 21. That the Respondent has also sold off part of Karuna/SOSIANI Block 2/215 to a person named DANIEL SUTER.



22. That the Respondents' other brother Mark Chirchir lives on and Farms Karuna/SOSIANI Block 2/64 measuring 30 acres and also Farms Karuna/SOSIANI Block 2/65 and Karuna/SOSIANI Block 2/93 totalling 60 acres.
23. That the Respondent sold 20 cows that were in IRONG/ITEN/1 and over 30 sheep. Currently, only 2 cows, 1 sheep and a lamb remain. He has also sold off all the cattle left behind by our father. He has never accounted for the funds received.
24. That the Respondent currently holds in his name that parcel of land known as Sergoit/Karuna Block 5 (Crown-land)/186 measuring 5 acres. This property belonged to our father as part of a 15-acre portion that was illegally acquired by some strangers and we are in the process of recovering the entire acreage. Amos Taiywa has however collaborated with the grabbers to spite our efforts to recover the full measure of the land belonging to our father.
25. That the conduct of the Respondent show that he is a very wasteful person and the estate would have been depleted by now were it not for my efforts.
26. That the Respondent abandoned a lorry KBS 484D belonging to the estate in Eldoret allowing it to waste away until it was salvaged and repaired through the concerted efforts of Jane Kimoso, Raymond Kimoso, Robert Kimoso and I.
27. That our father had enormous liabilities when he died constituting of loans amounting to close to kshs. 20 million which the 1st Respondent and I have worked hard to settle. The Respondent has contributed to zero towards settling the liabilities of the estate and is instead focused on depleting the assets thereof.
28. That the Respondent herein harvested and sold all the blue gum trees in the properties and kept the funds to himself.
29. That we have supported the Respondent by paying his school fees at Kenyatta University and he dropped off in second year even after had paid his fees for the entire year.
30. That the 2nd Applicant and I have worked hard to maintain unity in the family as is demonstrated by the fact that we pay or paid fees those of our siblings who were in school at the time of our father's death.
31. That we have done everything possible to support the Respondent but it is very clear that his intention is to sell off any assets that he can lay his hands on.
32. That I am aware that the Respondent has over the years sold the following equipment: -
 - a. Jacto sprayer 600L
 - b. 7-ton trailer
 - c. S tine yellow filler
 - d. Heavy duty 4-disc plough
 - e. Maize sheller
 - f. John Deere engine- yellow in colour
 - g. 24-disc Harrow
 - h. Grain tanker for combine harvester



- i. Water pump/generator
 33. That having depleted whatever was allocated to him, the Respondent's plan is to disrupt those of us who have been preserving the estate and putting the remainder of it to good use and growing its asset base.
 34. That I have been Farming the portion the portion that was allocated to me by my father at Imani Farm for the past 12 years, tending it, and exercising good husbandry over the years, only for the Respondent to come and interfere with it after selling off what was given to him.
 35. That the Respondent has been harassing me and the 2nd Applicant herein threatening to "stop everything" simply because he wants to have additional land to sell.
 36. That true to the threat, the Respondent has attempted to unsuccessfully seek orders of injunction against us in Succession Cause No. E036 of 2024 and when that fell flat, he sought the intervention of the OCS Karuna to no avail.
 37. That on 21st May 2024, the Respondent attempted to plant the Farm that I have already ploughed, harrowed and prepared for seeding.
 38. That the Respondent went and planted on the 2nd Applicant's Farm after she had ploughed it and harrowed it only awaiting to put seeds into it.
 39. That this interference by the Respondent arises out of a push to have more land to dispose of for a quick shilling since I am aware that he has some buyers already lined up.
 40. That given the conduct of the Respondent, he is a clear and present danger to the estate because it is highly likely that it will be wasted to badly that even his own children will be left without an inheritance.
4. The application is opposed by the Respondent vide a Replying Affidavit dated 18th June 2024 sworn by Amos Cheruiyot Taiwa in which he deposes as follows;
1. That the parcels of land known as LR No. Karuna/Karuna Block 3 (Imani)/20 and 21 measure approximately 61.23 Ha and 44.47 Ha respectively are registered in the name of one Susan Jeptoo Maritim.
 2. That our late father purchased the above parcels of land before the said Susan Jeptoo Maritim relocated elsewhere.
 3. That after the death of our father, (the deceased herein), the above parcels of land cumulatively measuring approximately 250 acres was mutually divided between the deceased's two houses as follows;
 - a. House one 80 acres which is fully arable
 - b. House two 170 acres of which 130 acres is arable
 4. That the deceased's two houses utilized the above parcels as above peacefully until about December 2023 when the Applicants alleged that the same had been bequeathed to them by our late father law a position member of the 2nd House, (save for the 2nd Applicant) do not agree with.
 5. That our suspicion of the will is further buttressed by the fact that the Applicants instituted Eldoret High Court P & A No. 139 of 2023 as an intestate.



6. That the Applicants apportioned themselves the above parcels of land whereby with each taking 150 and 100 acres respectively.
7. That when we attempted to raise our concern on the above apportionment, the Applicants used the police to have us arrested and never arraigned before court.
8. That the Applicants have been using an alleged will to allocate themselves parcels of land constituting our late father's estate to the disadvantage of other beneficiaries from the 2nd House, myself inclusive.
9. That contrary to the allegations made by the Applicants, I have never sold any asset belonging to our late father as alluded by the Applicants. Furthermore, no documentary evidence has been availed to corroborate the said allegations.
10. That I was also to bring to the attention of this Court the fact that land parcels Number Karuna/Sosiani Block 216 and 217 belonged to my late mother one Gatharina Chebiator Francis.
11. That I confirm that my late father is the one who sold LR. No. Karuna/Sosiani Block 216 in her lifetime.
12. That in the foregoing, land parcel Numbers Karuna/Sosiani Block 216 and 217 do not therefore form part of assets of our late father's estate as insinuated by the Applicants or at all.
13. That I confirm that I have never sold any cows, Farm machinery or land forming part of the estate herein as alluded by the Applicants or at all. No documentary proof has been availed to corroborate the said allegations.
14. That with regard to land parcel number Sergoit/Karuna Block 5 (Crown Land), it is not in dispute that the same is government land hence the allegations that I have caused the same to be registered in my name are not only false but uncorroborated by any evidentially proof.
15. That further to the above, the dispute over ownership of a portion comprised in the crown land by our late father is yet to be resolved.
16. That with regard to lorry registration number KBS 484D, I know of my own knowledge that our late father acquired the same by way of a loan facility of about 12 million. At the time of his death, he had paid only kshs. 2,000,000/= (read two million) of the loan due.
17. That I confirm having serviced the aforesaid loan to the tune of kshs. 6,000,000/= (read six million shillings only) before the same was forcefully taken by the 2nd Applicant.
18. That it is also within my personal knowledge that the aforesaid lorry developed mechanical problems while in the possession of the 2nd Applicant after she took its use and possession from the year 2017.
19. That I am personally aware that at the time of our father's demise, he had harvested 20,000/= bags of wheat and 10,000/= bags of maize which the Applicants sold and applied the proceeds to therefrom to their own personal needs at the expense of the other beneficiaries, myself inclusive.
20. That I am personally aware that our late father was to apply part of the above proceeds towards servicing his loan for the lorry registration numbers KBS 484D as I lived with him at the material time.



21. That on the issue of harvesting blue gum trees, I confirm that the proceeds therefrom were applied towards payment of school fees for our last born, one Judy Kimoso at Kapsabet Girls' High School.
22. That I confirm further that it is indeed the Applicants who have been intermeddling with the estate of our late father. For instance, the 1st Applicant sold our late father's tractor registration number KXX.
23. That I also confirm that our use of the Karuna/Karuna Farm had been agreed upon by all family members in the year 2014.
24. That I further confirm that we planted wheat on the above parcel of land which wheat was uprooted by the Applicants.
25. That I urge this to sustain the status quo on utilization that subsisted from the year 2104 until December, 2023 pending hearing and determination of these proceedings.
26. That I am swearing this affidavit in strong opposition of the motion under consideration.

Determination

5. The main issue for determination is whether the applicants have made out a case for grant of the injunctive orders sought and resultantly preserve the estate. In this regard, considering that the application has been brought pursuant to Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* and Section 47 of the *Law of Succession Act* provides: -

“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 Magistrates appointed by the Chief Justice.

6. On the other hand, Rule 73 of the *Probate and Administration Rules* provides that: -

“73. 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.”

7. The said two provisions cloth the High Court with discretion to do what is necessary to ensure that the ends of justice are met. In *Millicent Mbatia Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR the court affirmed that the two provisions grant the High Court powers to issue protective measures including injunctions for purposes of preserving the estate of a deceased person.

8. I have also considered the case *Floris Piezzo & Another v Giancarlo Falasconi* (2014) eKLR, Court of Appeal while considering whether an injunction can issue in a Succession Cause expressed itself as follows;

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause.



The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the *Probate and Administration Rules* reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the *Law of Succession Act* gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with Rule 73 of the *Probate and Administration Rules* which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

9. From the foregoing it is then evident that the High Court has jurisdiction to issue a wide range of orders including the issuance of conservatory and or injunctive orders where appropriate, to preserve and safeguard the estate of a deceased person. Indeed, it is common ground that for an injunction to be issued, the applicant must satisfy the three requirements settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that an applicant must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.
10. Have the Applicants established a prima facie case? The Court of Appeal in [Mrao Ltd v First American Bank of Kenya Limited and 2 Others](#) [2003] eKLR explained that it is,

“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”
11. In the present case, the applicants argued that the respondent whilst misrepresenting that he had orders from this court issued to him on 12th April, 2024 forcefully entered into Karuna/Karuna Block 3 Imani in possession and use by the applicants and planted an already ploughed and harrowed land.
12. In [Re Estate of Simon Kimendero \(Deceased\)](#) [2020] eKLR, the court noted that of specific significance to preservatory order in respect of estate property is that: -
 - a. The applicant has an arguable case;
 - b. The property is estate property; and
 - c. The property is likely to be dissipated or wasted away.
13. In the instant application and as noted above, prima facie, the applicants have an arguable case considering that they are beneficiaries of the deceased and therefore having an interest in the properties of the deceased. It is not in doubt that the property in question belongs to the estate. I hold the view that ploughing of the property belonging the estate before all is settled would amount to intermeddling and as such it is only just that the estate is preserved until the questions surrounding the estate are ironed out.



14. Conventionally, from the onset a probate court exercising jurisdiction over a testate or intestate estate of the deceased must establish whether the Petition is one based on a last testamentary of the deceased or it falls within the ambit of intestate proceedings requiring appointment of administrators under Section 66 of the *Law of Succession Act*. It is instructive to note that in this estate there is a purported will dated 12th July, 2011 which is yet to be propounded or its testamentary script adopted by the court. If so, that is the first step in any litigation involving probate proceedings. Therefore, any intellectual rigour or metaphysical analysis of an estate is moot. The Applicants have entered into the realm and details of this estate without first determining under which classification the administration of this estate falls within the succession code. Is it a probate or an intestate estate? It is sufficient and essential that first procedural issues be settled in a matter of this nature before even seeking leave of the court to issue any injunctive/freezing orders as stipulated in Order 40 Rule 1 and 2 of the *Civil Procedure Rules* as read conjunctively with Section 47 of the *Law of Succession Act*. The rules of law according to which cases of this nature are to be decided did not admit of any dispute so far as it is necessary unless and until any existence of a written will is propounded to a level that it satisfies the conscience of the court that the instruments so propounded is the last will and free intention, capable of being made by the testator. In general, where it appears that one beneficiary or a party with a right of inheritance to the aforesaid estate is harbouring suspicion that the purported will is a forgery or is a fraud, it's no excuse to initiate parallel intestate proceedings without first the document being declared as an illegality to govern distribution of the deceased's estate. It is all important that parties understand the proper method of approaching this question. This onus means the burden of establishing the issue lies wholly in the one who alleges but the law as it is drafted and interpreted restrains any litigant, heir, dependant to initiate multiplicity of proceedings without testing the law on the last testamentary survived of the deceased.
15. The question which this court is to decide at this stage is not whether the last testamentary meets the threshold of Section 11 of the *Law of Succession Act*, but as to whether a freezing/preservation order can issue to prevent any of the beneficiaries or creditors from moving, hiding or otherwise unjustifiably dissipating those assets of the deceased before the final decree of this court on distribution. In issuing such orders, principally the court is guided by the material evidence, the nature of the subject matter, the risk of dissipation of the assets before the matter is canvassed at an interparties forum or in procedural law an executor or administrator requires extension of time to apply for the necessary applicable orders to effectuate the administration of the estate. The threshold to be exercised by the court in such cases is fairly a low one for the court needs only to be persuaded that there is sufficiently evidential material that a cause of action exists and not that a cause of action must at the very end succeed on the merits.
16. In light of the above therefore, the affidavit evidence adduced before this court and indeed the cause of action in general, provides a strong basis that there is an arguable case with a probability of success and if this estate is left without a remedy of injunction or preservation, the proposed beneficiaries or heirs are likely to suffer irreparable injury which cannot be compensated by way of damages. In respect of the serious questions which may arise, the justice of the matter demands that a temporary freezing order of preservation be granted for a temporary period of 30 days for the applicants and objectors to regularize any procedural defects touching the matter of the estate of Francis Kipkoech Cheptoo Kimoso alias Kimoso; Succession Cause No. E036 of 2024.
17. That the action shall be immediately be set down for a speed trial to inter alia determine the last testamentary survived of the deceased.
18. The costs of this application shall be in the cause.



DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

In the Presence of

Mr. Oduor, Advocate for the Appellant

.....

R. NYAKUNDI

JUDGE

Representation:

Mutai Oduor & Co. Advocates

Isiaho Sawe & Co. Advocates

