



REPUBLIC OF KENYA



**In re Estate of Kipsoimo Ara Koech (Deceased) (Miscellaneous Application
04 of 2022) [2023] KEHC 3305 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 04 OF 2022
RN NYAKUNDI, J
APRIL 20, 2023**

IN THE MATTER OF THE ESTATE OF KIPSOIMO ARA KOECH (DECEASED)

BETWEEN

PETER KIMUTAI TUWEI 1ST PETITIONER

DAVID KIPKOSGEI SOIMO 2ND PETITIONER

AND

CECILIA CHEPNGETICH KOECH RESPONDENT

RULING

1. By Summons dated March 14, 2022, the Applicant seek the following orders: -
 1. Spent.
 2. That the Honourable Court be pleased to Order and call for Eldoret Chief Magistrates Court Cause No 325 of 2018 for the following orders: -
 - i. That pending the hearing and determination of this Application or until further orders of the Court, all proceedings and orders in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 be stayed.
 - ii. That the order made vide a ruling delivered on the March 4, 2022 be reviewed, varied and set aside with a view of the same being substituted with an order that Kenya Shillings Six Hundred and Sixty Seven Thousand, One Hundred and Seventy Shillings Only Kshs 667,170/= did not form part of the estate of the deceased notwithstanding that the same was spent to discharge parcel of land known as Nandi/Ngechek/413, an estate property.



- iii. That this Honourable Court be pleased to determine, find and order that parcel of land known as Nandi/Ngecheck/425 is not and has not been an estate property of the deceased and therefore cannot be subject of this Cause available for distribution or otherwise.
 - iv. That there be an order of this Honourable Court calling for Eldoret Chief Magistrates Court Succession Cause No 325 of 2018, In the Matter of the Estate of Kipsoimo Arap Koech- Deceased, for hearing and determination before this Court and in particular, Kapsabet High Court.
 - v. That Cost of this Application be provided for.
2. The application in premised on the grounds therein and it is further supported by two the affidavits each sworn on March 14, 2022 by Kipkosgei Choge and Peter Kimutai Tuwei.

The Applicants' Case

3. The Applicants deposed that the Petition before the Chief Magistrate Court, Eldoret is due for directions and further orders on an application for revocation of grant of letters of administration. That the application for an order to set aside the exparte application for revocation was allowed but the order to deposit Kshs 667,170/= was not set aside but instead affirmed.
4. The Applicants contend that Kshs 667,170/= was never part of the estate of the deceased. That despite the said sum not being part of the estate property it was applied in the discharge of parcel of land known as Nandi/Ngechek/413 an estate property that was charged to KCB Ltd in a loan borrowed by one Daniel Kipchirchir Soimo and not serviced.
5. The Applicants contend that the Respondent herein has allegedly sold a portion of the estate of the deceased without obtaining the grant for letters of administration. That the sold portion has now been restricted by an ongoing corruption investigation against the alleged purchaser which has thus greatly prejudice the estate in general and the Administrators in particular who cannot complete the administration process.
6. The Applicant further contend that the properties are situate in Nandi and that there is now a High Court in Kapsabet.
7. The Applicants urged the Court to have the file transferred from the lower court to this Court for hearing and determination.

The Respondent's Case

8. The Respondent, Cecilia Chepngetich, opposed the application vide her affidavit dated December 14, 2022.
9. The Respondent deposed that she is the widow to the deceased herein. According to the Respondent this instant application is not urgent in anyway but rather is incompetent, an afterthought, misadvised, misconceived, bad in law, unmerited, baseless, vexatious, frivolous, scandalous and an outright abuse of the due process of the court and does not warrant issuance of the orders sought.
10. The Respondent contends that no logical ground has been adduced to warrant the setting aside or varying the order that was issued in Eldoret Chief Magistrate's Succession Cause No 325 of 2018 vide the ruling delivered on March 4, 2022 given that the Applicants have not demonstrated that there was an error or omission apparent on the face of the record that would necessitate a review and or setting



aside of the order made in Eldoret Chief Magistrate's Succession Cause No 325 of 2018 vide the ruling delivered on March 4, 2022.

11. The Respondent denies allegations by the Applicants that parcel of land known as Nandi/Ngechek/413 has a loan and or restriction. The Respondent maintains that the allegations by the Applicants are not supported by any documentary evidence.
12. The Respondent maintains that the parcel of land that was under investigations is parcel of land known as Nandi/Ngechek 415 which has no bearing on parcels of land known as Nandi/Ngechek/413 and or 425 and the distribution of the estate of the deceased herein.
13. The Respondent contends that the Applicants herein have approached this Court with unclean hands and are in contempt of the order of the Court delivered on March 4, 2022 in Eldoret Chief Magistrate's Succession Cause No 325 of 2018 ordering them to deposit Kshs 667, 170/= thus lack audience to address the Court unless they comply with the said order. The Respondent further maintains that the sum of Kshs 667,170/= forms part of the estate of the deceased herein and that the allegations by the Applicants that the said amount does not form part of the estate of the deceased are not backed by any documentary evidence.
14. The Respondent further deposed that the deceased herein died intestate on January 28, 2022 and that prior to his death, he was a polygamous man having married two wives and thereby having two houses. That the deceased had 8 children with the 1st wife namely Salome Koech (Deceased) while the Respondent has 6 children with the deceased.
15. The Respondent maintains that the 2nd Applicant herein being a member of the 1st house and also being the area Chief of Ngechek Location wrote a letter on April 24, 2014 to KENTRACO confirming that she was the surviving widow of the deceased.
16. The Respondent further deposed that sometimes in 2014, KETRACO approached the Applicants for a Wayleave of 60 metres wide corridor which traversed 3.34 acres of Nandi/Ngechek/415 and an agreement was signed on April 21, 2014 wherein the Applicants were to be compensated Kshs 667,170/=.
17. The Respondent maintains that May 31, 2016 the 2nd Applicant herein wrote another letter to the High Court confirming that the money from KENTRACO was for the benefit of both houses.
18. The Respondent further deposed that on June 28, 2015 the 2nd Applicant wrote a letter authorizing the 1st Applicant to sign an easement letter on behalf of other beneficiaries without her consent.
19. The Respondent further contends that on October 8, 2019, the Applicants herein instructed the firm of Otieno Okeyo & Co Advocates to write a letter to KENTRACO authorizing payment to the Applicants' account being Account No xxxx held at Co-operative Bank Kapsabet Branch which amount was released by KENTRACO on September 24, 2020.
20. The Respondent further contends that the 2nd Applicant while acknowledging the fact that the deceased herein bought parcel of land known as Nandi/Ngechek/425 from one Kibii Samoei in 1972 applied for distribution of the estate of the deceased and stated that half of the said parcel was to be registered in his name in trust for the 1st House while the other half was to be registered in the name of the 1st Applicant in trust for the 2nd House without her approval or consent.
21. The Respondent further deposed that on May 31, 2020 the 2nd Applicant fraudulently transferred to himself parcel of land known as Nandi/Ngechek/425 and proceeded to sub-divided the same on November 12, 2020 into parcel Nos 1165 -1169. The Respondent maintains that from the foregoing ii



is evident that the Applicants having been engaging in acts of fraud aimed at disinheriting all the lawful beneficiaries to the estate of the deceased which acts have been perpetuated mostly by the 2nd Applicant.

22. The Respondent maintains that the Applicants herein are guilty of material non-disclosure having failed to this Court that they held a meeting and agreed to commence succession proceedings without involving her and misled the Court to believe that the administrators had already been appointed which was false and thus the revocation proceedings that are still ongoing. The Respondent contends that there was no authorization or minutes from family members authorizing the Applicants to engage KENTRACO for compensation whatsoever.
23. The Respondent urged that this instant application ought to be dismissed with costs.
24. The Respondent maintains that the estate of the deceased is valued less than 20 million thus capable of being handled at the Chief Magistrate's Court.
25. The Application was canvassed vide written submissions. On January 25, 2023, the Applicants through their Advocates, Messrs Kipkosgei Choge & Co filed submissions dated January 23, 2023 whereas the Respondent did not file any.

Analysis & Determination

26. Having considered the present application, the affidavits in support and opposition of the said application, as well as the submissions on record, it is my view that the main issues for determination by this Court are:
 - a. Whether this Court should order stay of proceedings and orders emanating from Eldoret Chief Magistrates Court Succession Cause No 325 of 2018
 - b. Whether this Court should set aside the Ruling/Order delivered on March 4, 2022 in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 ordering the Applicants herein to deposit the sum of Kshs 667,170/= in Court.
 - c. Whether this Court should order that parcel of land known as Nandi/Ngechek/425 is not and has not been the property of the deceased and therefore cannot be subject to this Cause.
 - d. Whether this Court should call for the file in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 for hearing and determination.

Whether this Court should order stay of proceedings and orders emanating from Eldoret Chief Magistrates Court Succession Cause No 325 of 2018

27. In the case of *Kenya Wildlife Service Vs James Mutembei (2019) eKLR*, Gikonyo J 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 proceeding is high and stringent'.

28. In the Kenya Wildlife Case (Supra), Gikonyo J quoted *Halsbury's Law of England, 4th Edition Vol 37* page 330 and 332, that:

'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 proceeding 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 not 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. From the foregoing, it is evident that the power to grant stay of proceedings is an exercise of the discretion of the court on sufficient cause being shown by an Applicant. As stated by the Court of Appeal in the case of *David Morton Silverstein VS Atsango Chesoni (2002) eKLR*: -

'The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay'.

30. In the present case, the Applicants have sought for stay of proceedings in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018. However, in my view they have not tendered any substantive reasons as to why they want the proceedings therein stayed. As highlighted in the case of Kenya Wildlife Case (Supra) 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 therefore courts will be reluctant to order stay of proceedings wherein clear that there no compelling reasons whatsoever to do so. In this case it is my finding that the Applicants have not demonstrated to this court why they are deserving of the stay orders being sought.

Whether this Court should set aside the Ruling/Order delivered on March 4, 2022 in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 ordering the Applicants herein to deposit the sum of Kshs 667,170/= in Court.

31. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows: -

Section 80. Review

'Any person who considers himself aggrieved—

- (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

[Order 45, rule 1.] Application for review of decree or order.

- (1) Any person considering himself aggrieved—



- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review'

32. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd vs Ndungu Njau.
33. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
34. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
35. In the present case, the Applicants want this Court to review the order that was issued on March 4, 2022 directing them to deposit the sum of Kshs 667,170/= in Court. The Applicants contend that the said Kshs 667,170/= does not form part of the estate of the deceased herein and thus should be included in this Cause. The Respondent, on the other hand argued that there was no apparent error or omission on the face of the record that would necessitate setting aside of the order that was made on March 4, 2022 in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018.
36. I have carefully perused the impugned Court order and I see no apparent error or omission on the part of the trial Court in making the said order. The Applicants' maintain that the Kshs 667,170/= does not form part of the estate herein. In my view this is an issue that cannot be determined at this particular stage but rather after the substantive hearing of the respective parties to this Cause. Further if the Applicant were indeed aggrieved by the said order then they ought to have preferred an appeal against the said order but not to seek a review of the same.



Whether this Court should order that parcel of land known as Nandi/Ngechek/425 is not and has not been the property of the deceased and therefore cannot be subject to this Cause.

37. To mind it will premature to order that parcel of land known as Nandi/Ngechek/425 is not and has not been the property of the deceased and therefore cannot be subject to this Cause. This will be making a final determination on the issue without necessarily having heard the respective parties to the dispute. In my view this is an order that the Court can only rendered after hearing the respective parties and therefore cannot issue at this particular juncture. This will simply be pre-empting the issues surrounding the administration of the estate of the deceased at this interim stage.

Whether this Court should call for the file in Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 for hearing and determination.

38. The Applicants have urged the Court to transfer the Cause herein from Eldoret Chief Magistrates Court Succession Cause No 325 of 2018 to this Court. The Applicants have however not tendered any substantive reasons to warrant the transfer of the said file to this particular court. The Applicants save for mentioning that currently we have a High Court in Kapsabet have failed to demonstrate to this Court whether the Eldoret Chief Magistrate's Court is lacking in jurisdiction so as to enable the Court make appropriate orders.

39. In light of the foregoing observations, it is my finding that the Applicants' application dated March 14, 2022 lacks merit. Accordingly, I hereby dismiss it.

40. Each party shall bear its own costs noting that the claim herein is a succession cause involving members of one family.

It is so ordered.

DATED AND DELIVERED VIA E-MAIL AT ELDORET THIS 20TH DAY OF APRIL 2023

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R.NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

Kipkosgei Choge & Co. Advocates

Kiprop Luseria & Co. Advocates

Kagunza for the Respondent.

