



**In re Estate of Mark Kiptarbei Too (Deceased) (Succession Cause
16 of 2018) [2023] KEHC 22565 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 16 OF 2018
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

MARY JEPKEMBOI TOO 1ST ADMINISTRATOR

SOPHIA JELIMO CHEMENGEN 2ND ADMINISTRATOR

AND

MOSES KIPROTICH TOO 1ST OBJECTOR

CEPKOECH TOO 2ND OBJECTOR

SAMMY WAKI MULILI AKA KIPLAGAT TOO 3RD OBJECTOR

ALI MARK KIPTARBEI TOO 4TH OBJECTOR

ARAFAT MOHAMMED BAKARI 5TH OBJECTOR

AND

ELIZABETH JEPKOECH TOO INTERESTED PARTY

JENNIFFER JEBET TOO INTERESTED PARTY

DANIEL KIPCHICHIR TOO INTERESTED PARTY

SANDRA JEROP TOO INTERESTED PARTY

KEVIN KIPKEMEI TOO INTERESTED PARTY

SHARON JEPCHUMBA TOO INTERESTED PARTY

RULING

1. This Succession Cause relates to the estate of the late Mark Kiptarbet Too upon whose estate this Court issued a Grant of Letters of Administration Intestate on 12/07/2021.



2. This Ruling is in respect of the Chamber Summons dated 15/03/2023 filed by the 2nd Administrator. The Application is filed through Messrs Prof. Tom Ojienda & Associates Advocates and seeks the following orders:
 - i. That there be an order staying the Succession proceedings in Succession Cause No. 16 of 2018 In the matter of the Estate of Mark Kiptarbei Too (deceased) pending the hearing and determination of Supreme Court Petition No. 32(E036) as consolidated with Petition No. 35(E038) and 36(E039) of 2022 *Fanikiwa Limited, Mary Jepkemoi Too & Sophie Jelimo Too, Lonrho Agribusiness (EA) Limited and David E. Korir v Sirikwa Squatters Group and 20 Others*.
 - ii. That costs be in the Cause.
3. The Application is premised under Order 42 Rule 6(1) of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#), Rule 49 and 73 of the [Probate & Administration Rules](#) and all other enabling provisions of the law.
4. The Application is then based on the Affidavit of the 2nd Administrator, Sophia Jelimo Chemengen and the grounds summarized as follows:
 - i. A substantial part of the estate was undergoing litigation and pending hearing and determination in the Court of Appeal in Civil Appeal No. 45 of 2017 (consolidated with Civil Appeal No. 44 of 2017), *Fanikiwa Limited v Sirikwa Squatters Group and Others*.
 - ii. On 18/11/2022, the Court of Appeal cancelled all the titles belonging to Fanikiwa Limited (one of the companies in which the late Mark Too was a director/shareholder) particularly LR No. Pioneer/Ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902.
 - iii. As a consequence, on 21/11/2022, Fanikiwa Limited instituted a Petition of Appeal at the Supreme Court as of right being Supreme Court Petition No. 32(E036) of 2022 *Fanikiwa Limited v Sirikwa Squatters & 20 Others*.
 - iv. The Court of Appeal also cancelled titles belonging to the estate of the late Mark Kiptarbei Too particularly Pioneer & Ngeria Block 1(EATEC)/7078, 7079, 7080, 7073, 7074, 7075, 7076, 7077, Pioneer Ngeria Block 1-2123, 2917, 2454, Pioneer Ngeria Block 1-6877, 6878, 6879, 6880 and 6881.
 - v. As a consequence, on 14/12/2022, the Administrators of the estate of the late Mark Kiptarbei Too instituted a Petition of Appeal at the Supreme Court as of right being Supreme Court Petition No. 35(E038) of 2022 *Mary Jepkemoi Too v Sophie Jelimo Too (suing as joint Administrators ad litem in the estate of Mark Kiptarbei Too v Squatters & 20 Others*.
 - vi. These Petitions were later on consolidated with other related Petitions of Appeal and are now known as Supreme Court Petition No. 32(E036) as consolidated with Petition No. 35(E038) and 36(E039) of 2022 *Fanikiwa Limited, Mary Jepkemoi Too & Sophie Jelimo, Lonrho Agribusiness (EA) Limited and David E. Korir v Sirikwa Squatters & 20 Others*.
 - vii. The parcels referred to in (ii) above that are the subject matter of Supreme Court Petition No. 32(E036) *Fanikiwa Limited v Sirikwa Squatters & 20 Others* and the parcels referred to in (iv) above that are the subject of SC Petition No. 35(E038) *Mary Jepkemoi Too & Sophie Jelimo Too*



(suing as joint Administrators ad litem in the estate of Mark Kiptarbei Too v Sirikwa Squatters & 20 Others form a substantial part of the estate of the late Mark Kiptarbei Too.

- viii. All the titles aforesaid stand cancelled and unavailable for Succession as at today as a consequence of the Court of Appeal Judgment delivered on 18/11/2022.
 - ix. No distribution of the above properties can therefore be undertaken unless and until the Supreme Court has set aside the Judgment of the Court of Appeal dated 18/11/2022 that cancelled the said titles as this Court cannot be called to sanction the distribution of cancelled titles.
 - x. More importantly, this Court does not have the jurisdiction to hear and determine any issue in relation to these parcels as the sanctity of these titles are directly and substantially in issue at the Supreme Court in Supreme Court Petition No. 32(E036) as consolidated with Petition No. 35(E038) and 36(E039) as aforesaid.
 - xi. In the circumstances, it is in the interest of fairness and justice that these Succession proceedings be stayed pending the hearing and determination of the said Supreme Courts matters.
 - xii. None of the parties herein will be prejudiced if this Application is allowed as prayed.
 - xiii. On the other hand, several beneficiaries may be prejudiced if these proceedings are not stayed as they may end up with inheritances that cannot be legally transferred if the Supreme Court does not overturn the Court of Appeal Judgment dated 18/11/2022.
5. The Application is supported by the Affidavit of the 2nd Administrator, Sophia Jelimo Chemengen in which she basically reiterated the grounds already referred to above.
 6. A copy of the said 148-page Judgment delivered in Court of Appeal (Eldoret) Civil Appeal No. 45 of 2027 (consolidated with Civil Appeal No. 44 of 2017) together with copies of some pleadings filed and orders issued therein are exhibited to the Affidavit. Also exhibited are copies of some pleadings filed and orders issued in the Supreme Court.
 7. Mr. Mburu, Counsel appearing for both the 1st Administrator and the 1st Objector (through Messrs J.M. Waiganjo & Co. Advocates), informed the Court that although his clients have not filed any Replying Affidavits, they are in support the Application.
 8. The 2nd Objector represented by Messrs Judy Thongori & Co. Advocates and the 4th Objector represented by Messrs Rioba Omboto & Co. Advocates are the only parties that expressly opposed the Application and filed Replying Affidavits to that effect.
 9. The 5th Objector represented by Messrs Ondieki & Ondieki Advocates does not appear to have participated in the Application at all.
 10. Since I note from the record that the Applicant's Advocates, Messrs Tom Ojienda also represents the 1st, 2nd, 4th, 5th and 6th Interested parties, I presume that they all support the Application.
 11. As regards the 3rd Objector (Sammy Waki Mulili aka Kiplagat Too) and the 3rd Interested Party (Daniel Kipchumba Too), it is not clear from the record whether they are represented by Counsel in this matter and it is therefore also not clear whether they have participated in the Application.

2nd Objector's Replying Affidavit

12. In opposing the Application, the 2nd Objector swore the Affidavit filed on 11/05/2023 through Messrs Judy Thongori & Co. Advocates. In summary, she deponed that the Applicant's Affidavit contains



material non-disclosure and falsehoods intended to mislead this Court, the Application is premature as the issues of whom the beneficiaries of the estate are is yet to be finalized and has nothing to do with the issues of properties, despite this Court issuing orders directing that DNA tests be conducted so as to ascertain if she is a child of the deceased, the Administrators blatantly refused to honour the said orders and instead chose to appeal against the decision, no stay orders have been issued by the Appellate Court and the said orders are still in force, as such the present Application is a delay tactic and another ploy to prevent the suit from moving forward for the reason that the Applicants seek to stay Succession proceedings on account of awaiting the hearing and determination of the Supreme Court consolidated Petition, the Applicants allege that this is based on the fact that the Court of Appeal cancelled all the titles belonging to Fanikiwa Limited where the deceased was a director/shareholder and also cancelled titles belonging to the estate, this Court should take note that the Applicants allege that the deceased was a shareholder and a director of Fanikiwa Limited holding 1 share therein, this Court only has jurisdiction to distribute the shares of the said company and not the properties owned by it, it would therefore mean, even if the Supreme Court made a determination on the revoked titles and found in favour of Fanikiwa Limited, this Court would still have no jurisdiction to distribute the properties owned by Fanikiwa Limited and would only be limited to the distribution of the deceased's share in the said company.

13. She added that with regard to the properties registered in the deceased's name whose titles were allegedly revoked, the Applicant has not provided evidence to prove that indeed all the properties belonged to the deceased. She then listed 16 properties which she deponed are the only properties listed in the present Application and also appear in the Summons for Confirmation of Grant and whose titles were availed, that all the other properties listed are surfacing for the first time in the Application without any proof of ownership to support the prayers sought, in any case, this Court has the discretion to set aside the properties subject to Court cases and deal with them once the cases have been resolved and ownership determined, the estate is vast and in the event the Court decides to set aside, there would still be enough properties available for distribution, the Applicants have been in control of the estate since the deceased died and therefore suffer no prejudice if the matter is delayed yet there are beneficiaries who are in dire need of funds, in light of the above averments, the Application is premature and a delay tactic and therefore be dismissed.

4th Objector's Replying Affidavit

14. On his part, in opposing the Application, the 4th Objector swore the Affidavit filed on 25/04/2023 through Messrs Rioba Omboto & Co. Advocates. In summary, he deponed that the orders sought should only be limited to those properties which are under contention before the Court of Appeal and/or Supreme Court. He then listed 44 properties that are in contention in those Courts and also separately listed about 60 others that are not in contention therein.
15. He further deponed that the property, LR No. Soy/Kipsombe Block 12/30 was awarded to him and the 5th Objector and does not form part of those cancelled titles or undergoing litigation process before the Supreme Court, it is on record that a consent on the mode of distribution of the estate was entered, his objection was compromised and withdrawn on terms that he be recognized as the son of the deceased and consequently, as one of the dependents, that he be awarded 50 acres to be hived from LR No. Soy/Kipsombe Block 12/30 as full and final settlement of his shares of the estate of the deceased, that he be awarded a liquidated sum of Kshs 10,000,000/- as full and final settlement of his share of the estate and that a further sum of Kshs 6,000,000/- be paid as legal fees to his Advocates.
16. He added that LR No. Soy/Kipsombe Block 12/30 does not form part of the properties in dispute before the Supreme Court, in any event, there are "stay orders" in all those properties which are



under contestation before the Supreme Court, it is within his knowledge that the 2nd Administrator-Applicant has leased the awarded 50 acres together with his co-Objector's 50 acres (total 100 acres) to a 3rd party and she are enjoying the proceeds/yields to their detriment, if at all the Applicant was acting in good faith, the amount of Kshs 10,000,000/- and Kshs 6,000,000/- awarded to him and his Advocate would have been paid as the income received from the estate in terms of rent, cultivating/leasing of 10,000 acres and other business ventures amounting to Kshs 100,000/- per annum, it is within his knowledge that there is "a stay of the Court of Appeal orders" and it is the 2nd Administrator who is enjoying the proceeds from the multi-million estate to the 4th Objector's detriment and other dependents, the partial distribution entered into by consent ought not to be interfered by the pending case before the Supreme Court. He therefore opposed the Application and urged the Court to direct that the proceeds earned from the estate be distributed and/or partially be awarded to him while awaiting the final determination of the Cause.

Hearing of the Application

17. It had been directed that the Application be disposed of by way of written submissions and the same be highlighted. Pursuant thereto, the Applicant's Advocates filed their Submissions on 10/05/2023, the 2nd Objector filed on 25/05/2023 and the 4th Objector filed on 25/04/2023.

Applicants' Submissions

18. Counsel for the Applicant submitted that the Court of Appeal cancelled a substantive part of the estate which means that distribution of titles cannot proceed, on 6/02/2023 the 4th Objector filed an Application seeking allowance to cultivate the parcel of land namely LR No. Soy/Kipsombe/Block 12/30 as per the consent entered into on 7/10/2021 as part of his final settlement, it was the Applicant's view that it is impossible to settle any beneficiary to the exclusion of other beneficiaries at this juncture as a result of the abovenamed decision, a miscarriage of justice would be occasioned should this Court not stay the proceedings in this matter as it involves distribution of properties whose titles have since been cancelled through the Court of Appeal Judgment, this Court further does not have the jurisdiction to adjudicate over a matter that is before the Supreme Court pending determination. On jurisdiction, he cited the locus classicus case of *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* (1989) 1 KLR 1 and *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* (2013) eKLR and added that distribution of properties herein cannot take effect as a result of the pending matters before the Supreme Court, the hands of this Court are tied as the outcome of the Supreme Court cases are unknown, it is the outcome of these matters that would determine the discourse of this matter, the Court of Appeal cancelled a total of 61 titles which are part of the distribution in the proceedings, the Applicant being aggrieved with the decision moved to the Supreme Court, the Supreme Court, as the ultimate judicial agency in conduct of the subject in these proceedings, this Court has no jurisdiction to entertain this matter.
19. Counsel submitted further that the elephant in the room is the Appeal before the Supreme Court because as at now, there is not much to distribute among the beneficiaries, the titles stand cancelled and in proceeding with this matter, this Court will be turning a blind eye to the fact that the Court of Appeal has cancelled the titles, which are part of distribution in these proceedings, as it stands, the estate is not even ascertained, as such proceedings herein would merely be a ridicule to the justice system, it is not in contention that not all titles have been cancelled, the Applicant is aware that the property awarded to the 4th Objector is not among those cancelled at the Court of Appeal, however, if the Court proceeds to award the 4th Objector what was agreed in the consent, without the outcome of the matter before the Supreme Court then it would be unjust to other beneficiaries, there would be no prejudice to be suffered if the 4th Objector holds his horses until the matter is determined, in any case, it was



until recently that a Consent was entered into therefore a little patience should be exercised on the 4th Objector's part for determination in the Supreme Court to be concluded before properties can now be distributed. Counsel cited the decision of Ringera J in *Global Tours & Travels Limited: Nairobi HC Winding Up Cause No. 43 of 2000* on the issue of whether or not to stay proceedings and added that these proceedings relate to the matter before the Supreme Court and all other beneficiaries stand to be disinherited should this matter proceed, further, since the outcome is unknown, this Court would be moving in circles as it would have to retake back available distributed properties and then redistribute should the Supreme Court Ruling disregard the decision at the Court of Appeal which would basically be wasting the Court's time. Counsel then cited the case of *Chris Munga Bichage v Richard Nyadaka Tongi & 2 others* (2013) eKLR and also Section 24(1) of the *Supreme Court Act*, 2011 and added that it is in the interest of justice and to avoid an abuse of the Court process that the Court exercises its unfettered inherent authority and stay the proceedings.

20. He submitted further that Section 26 and 29 of the *Law of Succession Act* 2012 are very clear on who a "dependant" is and the provisions for those dependents that have not been adequately provided for by will or on intestacy, all the parties herein are beneficiaries of the estate, the properties cannot be subject to distribution as the subject matter is before a superior Court, if this Court does not stay its proceedings then the beneficiaries stand to be disinherited of what rightfully belongs to them because as it stands, following the said decision, there is nothing to be distributed, if these proceedings are not stayed then there would be no appeal to pursue and the beneficiaries would be disinherited. He cited the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227 quoted in *NIC Bank Limited & 2 Others v Mombasa Water Products Limited* [2021] eKLR and added that the beneficiaries stand to suffer irreparable losses in the event the orders sought are not granted, they stand to lose their inheritance and rights to own property under the estate.
21. Counsel submitted further that it is in the interest of justice to preserve the parcels, the order of stay of proceedings sought is of conservatory nature and as such, no party stands to suffer any prejudice should this Court grant the same, there is need to balance the rights of all the parties and therefore the Court should stay its proceedings in distribution of the estate. He cited the case of *Equity Bank v West Link MBO Limited* (2013) and implored upon the Court to consider the peculiar facts and circumstances of this case and find that the Application is with merit to avoid defeating the substance of the Supreme Court Petition.

2nd Objector's Submissions

22. In her Submissions, Counsel for the 2nd Objector, on behalf of Messrs Judy Thongori & Co. Advocates stated that the Application has been made under Order 42 Rule 6(1) of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, Rules 49 and 73 of the *Probate and Administration Rules*, the *Civil Procedure Act* and Rules do not apply in Succession proceedings as the *Law of Succession Act* is "self-sufficient", Order 42 Rule 6 is not applicable in this Cause, the position has been stated in several decisions particularly the case of *Re Estate of Kithumbu Nyaga Elijah (Deceased)* [2021] eKLR. She then posited that in any case, even if the *Law of Succession Act* could accommodate the *Civil Procedure Rules*, Order 42 Rule 6(1) does not grant the Court power to give the Orders sought, this is because the said provision applies where a party is applying to stay execution of an order or decree which is not the case here. He cited the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR.
23. Counsel submitted that she acknowledges that the Applicants have also invoked Rule 73 of the *Probate & Administration Rules* which could be a cover save for the fact that a prayer for stay of proceedings is discretionary and applicable only in exceptional cases. She cited *Halsbury's Laws of England*, 4th



Edition, Vol. 37, page 330 and 332 and also the case of *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000 (cited *in Re Estate of Leah Nyawira Njega (Deceased)* 2021 eKLR. She added that in that case the Court summarized the guiding principles to consider when addressing an Application for Stay of proceedings as whether an Applicant has established that he/she has a prima facie arguable case, whether the Applicant has filed the Application expeditiously and whether the Applicant has established sufficient case to the satisfaction of the Court that is in the interest of justice to grant the orders

24. On whether the Applicant has established a prima facie arguable case, Counsel submitted that the same has not been proven since the Succession proceedings are yet to get the stage of distribution, in fact the issue as to who comprises the list of beneficiaries is yet to be concluded, on 22/09/2022 this Court issued Orders directing the Applicant's children to submit themselves for DNA tests against the 2nd Objector's sample, to date the said tests have never been carried out as the Applicants have applied to stay the decision and so the issue as to who are beneficiaries is still outstanding, the above notwithstanding, with regard to the cancelled titles, there are 2 angles to the issue, (a) titles held in the company name and (b) titles held in the deceased's name.
25. Counsel averred that on the issue of titles held in the company name, even if the superior Court allowed the prayers sought by the Applicants, this Court can only deal with the deceased's shares, it has been deponed that the deceased only held one share in Fanikiwa Limited and as such, that would be the only share available for distribution, the estate can therefore not be held hostage in futility. She cited the case of *Pacific Frontier Seas Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) (4 March 2022).
26. She added that for the titles held in the deceased's name, there are several properties appearing in the Application whose titles have not been provided, there is therefore no way of ascertaining that indeed the said properties belong to the deceased, in any case, the deceased died a wealthy man with a vast estate, in the event that the Court determines the issues of beneficiaries and gets the confirmation of the Summons, the Court has powers to exclude the properties in contention from distribution.
27. On whether the Applicant filed the Application expeditiously, Counsel submitted that the decision by the Court of Appeal was delivered back on 18/11/2022, shortly thereafter the Applicants moved to the Supreme Court seeking to appeal the decision, it would therefore appear that the filing of the Application was an afterthought perhaps to avoid addressing the issue of who the beneficiaries of the estate are, the Applicants are coming to Court with unclean hands.
28. On whether the Applicant has established sufficient cause that it is in the interest of justice to grant the orders, Counsel submitted that the Application is not only premature but does not raise enough grounds to warrant stay of proceedings, should the Court be inclined to allow the stay of proceedings, by the time the Supreme Court matter is determined and this Cause reinstated, the Court would be coming up to a determination on who the beneficiaries are and not distribution, this will not be in the interest of justice, further, the estate has beneficiaries who are in dire need and who should be provided for, instead, the Administrators who are in control of the entire estate continue to frustrate the beneficiaries and with the present Application, there is no apparent end in sight.
29. In conclusion, Counsel submitted that it is in the best interest of all beneficiaries and the estate that the Court decline to grant the orders sought.

4th Objector's Submissions

30. In his Submissions, Counsel for the 4th Objector, on behalf of Messrs Rioba Omboto & Co. Advocates stated that the estate is comprised of vast and rich properties situated in Eldoret, Kitale, Nakuru,



Nairobi, Mombasa, Kericho and various other locations within the Republic of Kenya, the properties which are pending litigation are only situated within Eldoret, he then listed about 45 properties situated in Eldoret which according to him, are the only properties pending litigation, he added that the property known as LR Soy/Kipsombe Block 12/30 awarded to the 4th and 5th Objectors does not form part of those cancelled titles or undergoing litigation before the Supreme Court, on 4/10/2021 a consent order on the mode of distribution of the estate was entered and compromised in return for the withdrawal of the objections on terms that the 4th Objector be recognized as a son of the deceased and as one of the dependents under Section 29 of the *Law of Succession Act*, that the 4th Objector be awarded 50 acres to be hived from LR Soy/Kipsombe Block 12/30 as full and final settlement of his share of the estate, that the 4th Objector be awarded a liquidated sum of Kshs 10,000,000/- as full and final settlement of his share of the estate, that a further sum of Kshs 6,000,000/- be paid as legal fees to his Advocates on record.

31. Counsel submitted further that LR Soy/Kipsombe Block 12/30 does not form part of the properties in dispute before the Supreme Court, in any event, there are “stay orders” in all those properties which are under contestation before the Supreme Court, it is within the 4th Objector’s knowledge that the Applicant has leased the awarded 50 acres inclusive of the 5th Objector’s share (total 100 acres) to a 3rd party and they are enjoying the proceeds/yields to the Objectors’ detriment, if at all the Applicant was acting in good faith the amount of Kshs 10,000,000/- and Kshs 6,000,000/- awarded to the 4th Objector and his Advocates could have been paid to them as income received out of the estate from the rent collection, cultivating/leasing of 10,000 acres and other business ventures amounting to Kshs 100,000,000/- per annum, there is “a stay of the Court of Appeal Orders” by the Supreme Court and it is the 2nd Administrator who is enjoying the proceeds earned from the multimillion estate to the detriment of the Objectors, the partial distribution entered by consent ought not be interfered by the pending case before the Supreme Court.
32. Counsel added that the 4th Objector is a son and a dependent of the deceased, he is entitled to receive a share. He cited Section 29 of the *Law of Succession Act* and added that the 4th Objector entered into a consent dated 7/10/2021 with the Administrators to this effect, the 4th Objector claims for partial distribution of the estate as he cannot survive without support from the vast estate, the 4th Objector was being maintained by the deceased since childhood and was left destitute and his livelihood paralyzed as a result of the death of his father. He further cited the case of *In Re Estate of GKK (Deceased)* (2007) eKLR and *Rabai Syalo Lutilo & David Ngilandala v Josephine Lutilo* (2017) eKLR and submitted that the consent order has not been challenged, set aside or varied. He also cited the case of *Elizabeth Wairimu Thimba & 2 Others v Wilfred Njogu Mbutia 2 others* (2014) eKLR and submitted that the consent was executed by the Administrators through their Advocates, it therefore should be considered by the Court in consideration of his prayer for partial distribution of the property pending the final distribution of the estate. Counsel further submitted LR No. Soy/Kipsombe/Block 12/30 does not form part of the properties of the estate which are in dispute or pending hearing and determination before the Supreme Court, it is not among those properties whose titles have been cancelled.
33. In conclusion, Counsel submitted that the Application has no merit and should be dismissed.

Oral Highlighting of Submissions

34. On 26/05/2023 the four Counsels, Ms Misiati holding brief for Prof. Ojienda for the 2nd Administrator-Applicant and also for some of the interested parties, Ms. Ndirangu for the 2nd Objector and Mr. Omboto for the 4th Objector highlighted their respective Submissions. They basically reiterated the matters set out in their respective Submissions and I will not therefore recite the oral Submissions.



35. I would only point out that on the issue of shares held by the deceased in Fanikiwa Limited, the Objector's Counsel argued that contrary to the allegations by the Applicant's Advocate that the deceased held 65% shares in the company, the correct position is that the deceased actually held only 1 share.
36. Mr. Mburu for the 2nd Administrator and the 1st Objector and who as aforesaid, had informed the Court that, despite not filing a Response, he supports the Application, also orally made his brief submissions. He submitted that the Summons for Confirmation dated 21/10/2021 is pending for hearing, the properties the subject of the Supreme Court case form a vast portion of the estate herein, it is prudent that these proceedings be stayed to await determination by the Supreme Court, the family is polygamous, distribution needs to be done equitably and that the parties should await determination by the Supreme Court.

Analysis and Determination

37. I have carefully considered the Application, responses thereto, Submissions by Counsel and the authorities cited. I also heard the Advocates orally. Upon considering the foregoing, I find that generally, the following are the issues that arise for determination:
- i. Whether the Application is fatally defective insofar as it invokes provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*.
 - ii. Whether the 2nd Administrator-Applicant has established a case for stay of these proceedings pending determination of the Appeal before the Supreme Court.
38. I now proceed to analyze and determine the said issues.

i. Whether the Application is fatally defective insofar as it invokes provisions of the Civil Procedure Act and the Civil Procedure Rules.

39. Counsel for the 2nd Objector submitted that the Application is fatally defective since the provisions that it has been brought under includes Order 42 Rule 6(1) of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*. On this point, I agree that the two provisions are not among the provisions of the *Civil Procedure Act* and *Rules* that have been imported into Succession proceedings since, as correctly argued by Counsel, the *Law of Succession Act* is "self-sufficient". This view has been reiterated in many Court decisions and I do not need to belabour the point. I will however only cite the case of *John Mundia Njoroge & 9 Others v. Cecilia Muthoni Njoroge & Another* [2016] eKLR, where Hon. Justice Mativo (as he then was), stated as follows:

"..... Rule 63(1) of the Probate and Administration Rules provides that:-

"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."

As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act*[3] are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.[4]"



40. Counsel also correctly observed that, in any case, Order 42 Rule 6 of the *Civil Procedure Rules* deals with Applications for stay of execution and therefore has nothing to do with stay of proceedings.
41. However, Counsel acknowledges that the Applicants have also invoked Rule 49 and 73 of the *Probate & Administration Rules*. The two provisions stipulate as follows:
- Rule 49 “A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit.”
- Rule 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.”
42. To my knowledge, there is no provision in the *Law of Succession Act* or in the *Probate & Administration Rules* that specifically deals with Applications for stay of proceedings pending Appeal. This may explain why the Applicant’s Counsel correctly resorted to Rule 49 which provides for such situations and also Rule 73 which clothes the Court with the inherent powers to make orders that would be necessary for the ends of justice. To this end, I find that the Applicant is on sound footing, notwithstanding the unnecessary inclusion of the inapplicable provisions of the *Civil Procedure Act and Rules*.
43. In any event, reliance on a wrong provision of the law, although strongly discouraged, would not by itself automatically render an Application fatally defective or incompetent if such error is merely a matter of form, rather than substance. Needless to state, this is not a carte blanche approval for litigants to ignore rules of procedure. Where necessary, deviation from the prescribed forms in pleadings may swiftly attract the striking out thereof.
44. In the circumstances, I decline the invitation to declare the Application as fatally defective.

ii. Whether the 2nd Administrator-Applicant has established a case for stay of proceedings pending determination of the Appeal before the Supreme Court.

45. It is trite law that when faced with an Application seeking stay of proceedings, 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 *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.”



46. 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 v 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...”

47. 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.”

48. Further, in *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.”

49. 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.

Whether the Applicant has established a prima facie arguable case

50. It is settled that in Applications of this nature, an “arguable appeal” need only raise a single bona fide point worthy of consideration by the Appellate Court 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).



51. On perusal of the exhibited Petition before the Supreme Court and the issues placed for determination before that Court and also upon perusing the 148-page Court of Appeal Judgment, I have no doubt in my mind that the Appeal before the Supreme Court is weighty. The Appeal raises serious issue of land law and constitutional law particularly the law relating to the issue of surrender of land to the Government and subsequent re-allocation of such land to third parties, rights of squatters on alleged ancestral land, legal effect of claims of entitlement to land on the basis of heritage and occupation by forefathers, legal effect of promises by the President to squatters to settle them on land, conversion of land tenure from one statute to another, allocation of land by the President, rights of alleged innocent purchasers for value without notice, cancellation of titles to land on the basis of alleged fraud viz a viz the right to property, indefeasibility of title and right to fair hearing under Articles 25(c), 40 and 50(2) of the *Constitution*.
52. It is stated in the Petition before the Supreme Court that the Appeal meets the threshold set under Article 163(4)(a) of the *Constitution* in that it involves the interpretation and application of the *Constitution* (see *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another* [2012] eKLR).
53. The mere fact that the Supreme Court deemed the Appeal fit and sufficiently arguable to warrant its admission to hearing is by itself sufficient to dispose of this issue. I therefore find that the intended appeal is arguable.

Whether the Application was filed expeditiously

54. Counsel for the 2nd Objector contended that the decision by the Court of Appeal was delivered on 18/11/2022, shortly thereafter the Applicants moved to the Supreme Court seeking to appeal the decision. According to her, the present Application is an afterthought filed to avoid addressing the issue of who the beneficiaries of the estate are.
55. I note that the Application was filed before this Court on 17/03/2023, 4 months after delivery of the Court of Appeal Judgment. Whether delay is inordinate is a question of fact and varies on a case-to-case basis depending on the circumstances of each case. Therefore, a delay of 1 month may in one case be deemed to be inordinate while a delay of 1 year in another case may well be found to excusable. Each case on its own facts and circumstances.
56. In this matter, although the Applicant's Advocates did not state so, I am alive to the fact that they could not have filed the present Application before they had filed the Appeals before the Supreme Court and the same formally admitted by the Supreme Court. They also needed time obtain a copy of the 148-page Court of Appeal Judgment, study it and obtain instructions before drafting and filing the present Application. This process obviously took some time. Considering this fact, I am willing to consider the presumed 4-months as excusable in the circumstances.

Whether 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

57. The Applicant's Advocates contend that one of the reasons why this Court should stay these proceedings is allegedly because this Court does not have the jurisdiction to hear and determine any issue relating to the parcels of land as the issue of sanctity of the titles is directly and substantially in issue at the Supreme Court in as aforesaid.
58. I cannot accept this submission for the reason that accepting it on the ground of lack of jurisdiction would mean that a Court must always, as a matter of right, automatically stay its proceedings anytime a party files an Appeal against an interlocutory order. Accepting this scenario will obviously lead to an



absurdity. I presume that by arguing as they have done, the Advocates are borrowing from Section 6 of the *Civil Procedure Rules* which provides as follows:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigation under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”.

59. Logically, the drafters of Section 6 could not have intended it to apply in relation to matters that are before an Appellate Court. I refuse to accept that the “Court” referred to in the phrase “pending in any other Court having jurisdiction in Kenya to grant the relief claimed” includes an “Appellate Court”. If that were so, then by simply filing an Appeal, one would automatically obtain a stay of proceedings and there would therefore be no need to apply for it. Accordingly, I decline the Applicant’s argument that this Court is divested of jurisdiction simply because there is an Appeal pending before the Supreme Court against the Judgment of the Environment and Lands Court. If stay of proceedings is to be granted in this matter, such stay would be granted on other basis and not on the ground of absence of jurisdiction.
60. On the issue of the identity of the titles revoked by the Court of Appeal, Counsel for the 2nd Objector submitted that with regard to the properties alleged to be registered in the deceased’s name, the Applicants have not provided evidence to prove that indeed all the properties listed belonged to the deceased, there is therefore no way of ascertaining that indeed the alleged properties belong to the deceased. She then listed 16 properties which she submitted are the only properties listed in both the present Application and also appear in the Summons for Confirmation of Grant and whose titles were available. According to Counsel, all the other properties listed are surfacing for the first time in the Application without any proof of ownership. Counsel for the 4th Objector made an almost similar argument but, on his part, he listed 44 properties which according to him are the only properties in contention in both Courts. I notice that the Applicant did not challenge these allegations.
61. Counsel for the 2nd Objector also submitted that this Court has the discretion to set aside the properties subject to the Appeal pending before the Supreme Court and deal with them once the cases have been resolved and ownership determined. He argued that the estate is vast and in the event that the Court decides to set aside, there would still be enough properties available for distribution. He added that the Applicants have been in control of the estate since the deceased died and will therefore suffer no prejudice if the matter is delayed yet there are beneficiaries who are in dire need of funds. According to him therefore, the orders sought should only be limited to those properties which are under contention before the Court of Appeal and/or Supreme Court.
62. While the above arguments may be valid, they are neutralized by the reality that nevertheless, a substantial number of the properties in contention in the Supreme Court are also in contention in this Cause. There would therefore still be grounds to stay the proceedings.
63. On his part, Counsel for the 4th Objector submitted that a consent on the mode of distribution of the estate was entered into in exchange for withdrawal by the 4th and 5th Objectors of their objections on terms that the 4th Objector be recognized as the son of the deceased and subsequently as one of the dependents, that he be awarded 50 acres to be hived from the property known as LR No. Soy/Kipsombe Block 12/30 as full and final settlement of his shares of the estate, that he be awarded a liquidated sum of Kshs 10,000,000/- as full and final settlement of his share of the estate and that a further sum of Kshs 6,000,000/- be paid as legal fees to his Advocates on record. He added that the



- consent order has not been challenged, set aside or varied. He also submitted that the property LR No. Soy/Kipsombe Block 12/30 awarded to him and the 5th Objector does not form part of those cancelled titles or undergoing litigation before the Supreme Court and that therefore there is no basis to stay its distribution.
64. I decline to canvass the above line of argument since it clearly departs from the issue before the Court. Counsel seems, in disguise, to be arguing his Application dated 6/02/2023 which is separate and pending for determination. By that Application, the 4th Objector is technically seeking enforcement of the alleged consent. By raising the issue of the alleged consent, Counsel appears to be cleverly trying to draw the Court into making statements that would, for all intents and presupposes, be prejudging his said pending Application. This the Court will not do.
65. On the issue of shares held by the deceased in Fanikiwa Limited, the Objectors' Counsel argued that contrary to the allegations made by the Applicant's Advocate that the deceased held 65% shares in the company, the correct position is that the deceased actually held only 1 share. They also argued that this Court only has jurisdiction to distribute the shares of the said company and not the properties owned by it. They argued further that this would therefore mean that even if the Supreme Court were to find in favour of Fanikiwa Limited, this Court would still not have jurisdiction to distribute the properties owned by Fanikiwa Limited since its mandate is limited to the distribution of the deceased's share in the said company.
66. While, again, the above argument may indeed be correct in law and while it may also be true that not all the properties in contention in the Appeal before the Supreme Court are also in contention before this Court, as aforesaid, I nevertheless find that a substantial number of the properties in contention in the Supreme Court are indeed also in contention in this Cause.
67. In conclusion, upon holistic and careful consideration of the matter and applying the principles of law set out above, I am inclined to agree with the Applicant's argument that full distribution of properties in this matter should not proceed before determination of the matters pending before the Supreme Court. I agree that it is the outcome of the Appeal matters that would conclusively determine the discourse of the distribution of the estate. As aforesaid, although I agree that not all the properties in contention in the Appeal before the Supreme Court are also in contention before this Court, I still find that a substantial number are indeed in contention in both matters. In the circumstances, I do not find any prejudice in partially staying distribution of the proceedings before this Court to avoid a scenario where if the grant is confirmed and properties distributed, it may become burdensome, costly and cumbersome to recover them in case the Appeal before the Supreme Court fails. I therefore hold that it is safer to preserve the estate by holding confirmation proceedings to await determination of the appeal. In any case, from my experience, I do not expect the determination by the Supreme Court to delay for too long.
68. 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. I therefore only grant a stay of confirmation of the grant and/or distribution of the estate. Other matters in the proceedings, including identification of the beneficiaries can and should still be prosecuted.
69. In reaching this verdict of only partially staying the proceedings, I have also taken into account the 4th Objector's contention that the Applicant has leased some properties and is enjoying the proceeds to the detriment of the other beneficiaries. The Objectors have also contended that the Applicants have been in control of the estate since the deceased died and therefore suffer no prejudice if the matter is delayed yet there are beneficiaries who are in dire need of funds. I note that the Applicant has not expressly



denied these allegations. According to the Objectors, the Application is a delay tactic. Considering these allegations, I find that it will be unjust for the Court to grant a blanket stay which will only result into suspension of the other parties' right to seek answers from such alleged acts, if true.

Final Orders

70. In the circumstances, the Notice of Motion dated 15/03/2023 succeeds only partially and only to the following extent and terms:
- i. Only confirmation of the Grant and consequent distribution of the estate is hereby stayed in this Cause pending determination of Supreme Court Petition No. 32(E036) as consolidated with Petition No. 35(E038) and 36(E039) of 2022 - *Fanikiwa Limited, Mary Jepkemoi Too & Sophie Jelimo Too, Lonrho Agribusiness (EA) Limited and David E. Korir v Sirikwa Squatters Group and 20 Others*.
 - ii. Consequently, unless where there was already in existence any specific prevailing stay orders, the parties are at liberty to proceed with the prosecution of any other Application, issue or matter arising in this Cause, including the issue of taking DNA samples or identification of the beneficiaries, as long as such prosecution does not breach or be in conflict with order (i) above.
 - iii. Since it is alleged that some properties of the estate have, by consent of the parties, already been identified and awarded to the 4th and 5th Objectors herein, Order (i) above shall not affect or in any way block the prosecution, hearing or determination of any Application, whether pending or yet to be filed, aimed towards determining the validity, formalization or existence of such consent or enforcement or implementation thereof.
 - iv. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

.....

WANANDA J. R. ANURO

JUDGE

