



REPUBLIC OF KENYA



**In re Estate of Kiptim Lagat (Deceased) (Succession Cause  
57 of 2008) [2023] KEHC 22013 (KLR) (1 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 57 OF 2008  
SM MOHOCHI, J  
SEPTEMBER 1, 2023  
IN THE MATTER OF THE ESTATE OF KIPTIM LAGAT (DECEASED)**

**RULING**

1. The Deceased died on February 4, 1972 leaving behind the estate comprising of and thirty-six (36) years later Samson Kipkosgei Arap Tim, the petitioner/applicant, petitioned for grant of probate of letters of administration intestate, on the February 27, 2008 which grant was issued on the 16<sup>th</sup> April 2008 and confirmed and a certificate of confirmation of grant was issued by justice D.K Maraga (Rtd Chief Justice Emeritus) on the December 10, 2008.
2. Almost two years after the confirmation of grant on the November 24, 2010, the court received representation by way of handwritten letter by Collins Kibitok Kiprono applying for photocopies of the entire succession proceedings alleging to be the son of the deceased brother to the petitioner, the late Joseph Kibitok Kiptim and also on behalf of the estate of a deceased brother to the petitioner the late Symon A. Tim and he was duly issued with the photocopies.
3. On the October 8, 2012, the Objectors/Respondents filed summons for revocation of the grant on the grounds that the grant was defective in substance, that the petitioner had made a false statement by making a material concealment from the court of facts and information material to the cause and that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant.
4. It is noteworthy that the ten (10) Objectors/Respondents contention was that Kiptim Lagat (deceased) was a resident of Tine Location in Koibatek District and Married to Kabon Kiptim Arap Lagat (deceased) and were blessed with Six (6) children who were his survivors and beneficiaries of his estate as follows;
  - a. The estate of Joseph Kibitok Kiptim (now deceased)-Son
  - b. Tabarno Koima-Daughter;
  - c. Simeon Kimeli Tim (now deceased) -Son;



- d. Talai Jebichii Kiptim-Daughter;
  - e. Samson Kipkogei Arap Tim-Son;
  - f. Christine Jepkoech Kiptim (deceased) -Daughter;
5. That the estate of Joseph Kibitok Kiptim (deceased) constitutes the following dependents;
- a. Grace Kimoi Kibitok-Deceased- Widow;
  - b. Joyce Jesang Kibitok-Daughter;
  - c. Mathew Kipruto Bitok-Son;
  - d. Judy Jeptarus Kibitok-Daughter;
  - e. Nixon Kiprop Kibitok-Son;
  - f. Collins Kiprono Kibitok-Son;
  - g. Alvine Kiprotich Bitok-Son; and
  - h. Arnold Kipkemoi Kibitok-Son
6. That the estate of Simeon Kimeli Tim (Deceased) constitutes the following dependents
- a. Salina Kiplagat-Deceased- Widow;
  - b. Gladys Jeruto-Daughter;
  - c. Isaac Kipkemoi Tim-Son;
  - d. Veronica Jeptoo Tim-Daughter; and
  - e. Eunice Jebet Tim-Daughter
7. The Objector's Application dated October 8, 2012 was withdrawn owing to the fact that the Advocate who filed the same was unqualified. The Objectors subsequently filed a fresh summons for revocation dated September 17, 2014 filed on the same date and on the same grounds. This Application has remained pending determination ever since.
8. Upon withdrawal of the summons for revocation dated October 8, 2012, the Petitioner was awarded Costs on the July 3, 2014, which issue was irregularly entertained in the succession cause, giving rise to a stalemate with the petitioner moving to execute and recover the costs.
9. This court on the May 27, 2015, directed that the summons for revocation of grant be fixed for hearing in the registry and that the objection proceedings shall be heard by way of viva voce evidence and the matter was fixed for hearing on the November 27, 2015 on which date the court was not sitting and before fresh hearing dates were fixed, the Petitioner once more, raised a Notice of Preliminary Objection dated March 4, 2016
10. On the February 6, 2017, the matter came up for hearing and rather than petitioner arguing the Notice of Preliminary Objection dated March 4, 2016, Mr Arusei Advocate urged for the Bill of Costs be disposed off before the hearing of the cause and the court directed as such, with the cause being stood over generally.
11. Between 2017 and August 2018 the petitioner moved to execute the certified costs against the objectors prompting the objectors to file an application under certificate of urgency dated 15<sup>th</sup> August 2018 to



stay the execution and review the taxed costs, which application was disposed off by the court on the April 1, 2019 with the court ordering that the taxation proceedings be dealt with by the taxing master and not the court and that the taxation proceedings be expunged from the record. And the main cause was fixed for hearing on the July 18, 2019.

12. On July 12, 2019, the Petitioner once more moved the court by filing an application “Notice of Motion” dated 18<sup>th</sup> July 2019, praying for the striking-out of the Objector’s summons for revocation dated August 15, 2023, vacating any interim orders and awarding him of the costs. This Application was heard ex-parte and the court directed the same be served upon the Objectors, and a mention for direction on the Application was scheduled for the July 30, 2019.
13. On the July 18, 2019 scheduled hearing, Mr. Gai for the Objectors was ready for the hearing of the main cause while Mr. Arusei for the petitioner who was not ready to proceed with the hearing of the succession cause, urged that his Application dated August 15, 2018 be heard first which the court allowed to be heard on the July 29, 2019 on a date which Mr Arusei was not ready to proceed triggering an adjournment to the 3<sup>rd</sup> February 2020, a date which the matter could proceed as the matter had just been assigned to a new court that directed that the matter be taken back to High Court 3 and a mention was scheduled for the February 19, 2020 when the matter was fixed for hearing on the May 26, 2020.
14. On the May 26, 2020, the matter did not proceed as scheduled and it was until the April 19, 2021 when both parties appeared before court and a Hearing date for the June 7, 2021 was fixed.
15. On June 7, 2021, when the matter came up for hearing, Mr Arusei for the petitioner once again instigated an adjournment by raising issues relating to the taxation of costs arguing that the same ought to be settled before the main cause may proceed. The court allowed an adjournment fixing the cause for hearing on the October 28, 2021.
16. The October 28, 2021, hearing date once again failed to take off and the matter was scheduled for hearing by the registry on the May 9, 2022 for the June 2, 2022 a date which Mr Arusei was absent triggering an adjournment to the June 27, 2022.
17. On the June 27, 2022, the matter could not take off as Mr. Gai for the objector was yet to file response to the Petitioner’s Application dated July 18, 2019 filed on the July 11, 2019, Mr Gai was allowed fourteen (14) days to respond, with a mention for compliance being scheduled for the July 12, 2022.
18. The matter was once before the Deputy Registrar on a scheduled hearing on the November 29, 2022 and the matter could not proceed owing to shortage of judges until the 23<sup>rd</sup> of February 2023 when the Parties appeared before Court and confirmed duly filing of their written submissions and the court fixed the Application dated August 15, 2018 for ruling on the May 15, 2023 and Mr Arusei was granted leave to file supplementary written submissions within seven (7) days.
19. Petitioner’s Application dated July 18, 2019, filed on the July 11, 2019, is supported by the sworn Affidavit of the petitioner/applicant, and sought the following prayers:
  - i. ....Spent
  - ii. That the Honorable court be pleased to grant an order striking out the objectors/applicant’s application dated the August 15, 2018 and filed on the 18<sup>th</sup> August, 2018 for want of prosecution.
  - iii. That the Temporary Orders issued on the August 29, 2018, be discharged and/or vacated from the record.



- iv. That this Honorable Court be pleased to make any other or such further orders as it may deem fit and just to grant.
  - v. That costs of the application be granted.....
20. On the other hand, the Objectors Application dated August 15, 2018, and filed on the August 18, 2018 pursuant to Section 100 Law of Succession Act and Rule 74 Probate Administration Rules, Vacation Rules and all other enabling provisions of the law, inter alia seek the following reliefs;
- i. That, the application herein be certified urgent and service dispensed with in the 1st instance and the same be heard during vacation..... spent
  - ii. That, the Honorable Court be pleased to stay the execution of the respondent's bill of costs taxed in the sum of Ksh 120,000/= and the attachment and sale of the applicants, property pending the hearing and determination of this application.
  - iii. That, the Honorable Court be pleased to review the taxed cost.
  - iv. That, the Costs of this application be in the cause.
21. This matter has both parties in a dead-lock lamenting the delay in dispensation of justice thereby inviting the court to consider the historic aspect in determination of the pending applications and the probate.

#### **Petitioner's Applicant written Submissions**

22. The Petitioner/Applicant Submits in its written Submissions dated February 8, 2023 that, the Objectors moved court on the August 29, 2018 under certificate of urgency, obtained ex-parte stay of execution of the Petitioner's/Applicant's bill of costs taxed in the sum of Ksh 120,000/= and the attachment and sale of the objector's property pending the hearing and determination of the Application.
23. The Petitioner Contends that the Objector's have failed to fix their Application for hearing and "gone to sleep while enjoying the interim Orders constraining him to file the instant Application.
24. That, the Objectors now want their Application dated August 29, 2018, put in abeyance forever and that the Court should Consider the Succession cause and that the Objector's Application has to be disposed of, before the objection in the succession cause can be entertained.
25. That the Petitioner had responded to the Objectors Application dated August 29, 2018, vide a replying Affidavit on the March 20, 2019.
26. That Rule 73 of the Probate and Administration Rules empowers the court to make such Orders for the ends of justice and to prevent abuse of the process of the court.
27. The Petitioner submits that the Court had directed on the February 6, 2017, that the bill before the taxing master be canvased while the main cause be stood over generally.
28. That the Objectors have failed and/refused to set down their Application for hearing and that the conduct by the objectors should not be allowed and placed reliance on the case of Kenya Red Cross Society v Mbondo Katbeke Mwanja [2020] eKLR, Justice G.V Odunga (now a Judge of Appeal) had this to say;

“ .....In other words, a party cannot rely on an awkward situation created by itself as a ground for seeking favorable orders from the court. Therefore, assuming that the applicant



had properly applied for extension of time within which to lodge the memorandum of appeal, that prayer would have failed since it is based on a situation of its own making.....".

29. That there has been an inexcusable delay on the part of the objectors and that the invitation to deal with the taxation of costs separately and independent of succession cause is not grounded in law and that the orders to tax costs were made in the court and poses the question as to "what is to be taken to another forum? where is that forum? And submits and insinuates faulting the court for directing on 1<sup>st</sup> April 2019, that, the taxation proceedings be dealt with by the taxing master and not the court and that the taxation proceedings be expunged from the record arguing that the court ought to exercise discretion on fixed principles and not private opinions, sentiments and sympathy or benevolence and not arbitrarily, whimsically or capriciously.
30. The Objectors have not advanced any substantial grounds to resist the petitioner's Application and once the Court vacates the interim orders the objectors may figure out what to do with their Application. The Petitioner thus pray that his Application dated 18th July 2019, filed on the 11th July 2019 be allowed.

### **Objectors Submissions**

31. The Objectors filed their replying Affidavit sworn by the 3rd Objector on the February 2, 2023 and written submissions on the 14th February 2023 submitting that the matter has been in court for a long-time and in the course of the proceedings the parties were informed that since there were pending applications in the matter submissions be filed in them. That the Objectors filed our submissions but also note that in the course of the proceeding's orders had been made that the matter to proceed to full hearing on merit. We rely on the court proceedings on those facts and in their submissions herein.
32. The Objectors contend that, the application dated July 18, 2019 is unfortunate, a diversion and malicious. The Petitioner in this matter secretly filed a petition for letters of administration to the estate of Kiptim Lagat (deceased) on the 27th February, 2008. The same was filed without the knowledge and consent of the Objectors. The Petitioner further obtained letters of administration and the confirmation thereof and proceeded to sub-divide the estate land parcel No. Lembus/Torongo/402 registered in the name of the deceased into 3 portions LR No. Lembus/ Torongo/790, Lembus/ Torongo/791 and Lembus/ Torongo/792 and registered the 3 land parcels in his name.
33. The Objectors filed an application to revoke and annul the letters of administration issued to the applicant way back on the October 12, 2012 and this matter has now been in court for over 10 years and the succession matter has not moved an inch. At the time of filing the application for revocation of grant, the Objectors were represented by the firm of M/s W.Kigen & Co. Advocates. The Petitioner was served with the application for revocation of grant and he filed his response through the firm of M/s Mirugi Kariuki & Co. Advocates. In the response the Petitioner raised a preliminary objection that the application was signed by an incompetent person forcing the Objectors to withdraw the application with costs and filed another similar application dated September 17, 2014 through another advocate.
34. The Petitioner on the April 30, 2015 did change his advocate from M/s Mirugi Kariuki Co. Advocates to the present advocate and the said advocate promptly filed a notice of preliminary objection to their application for revocation of grant praying that the matter be stayed until they are paid costs.
35. On the August 7, 2014 the previous advocate for the Petitioner, M/s Mirugi Kariuki & Co. Advocates, filed a bill of costs in this matter, that the Petitioner has been pursuing through his present advocate on record and which bill he proceeded to be taxed ex-parte and obtained a certificate of costs.



36. That the Petitioner was executing for the costs and the Objectors filed an application dated August 15, 2018 against the bill. On the August 30, 2018 the Court ordered stay of execution of the bill on condition that the Objectors pay a deposit in court in the sum of Ksh 60,000/ which orders the respondents complied with and paid up.
37. The Objectors submit that, when the matter came up for hearing on the April 1, 2019, the Court ordered that matters relating to the bill of costs, be expunged from the record, that the same be filed in a miscellaneous application and be canvassed independently from this matter and further that the succession cause be fixed for hearing on priority basis. In the light of the said Court order the application dated July 18, 2019 could not be canvassed further and the Petitioner's application dated 1<sup>st</sup> July, 2019 is thereof misplaced and has no merit as no further orders have been made concerning the application.
38. That after the said order, the Objectors have been pushing for a hearing of the succession matter on merit as ordered by the court and the matter has come up for hearing on many occasions but unfortunately has never taken off. In these proceedings there have been many further orders reinforcing the order that the succession cause proceeds to hearing. While on their part we have been pushing for the succession matter to be heard and determined on merit the Petitioner on the other hand has been opposing a hearing of the matter on merit and has been raising all manner of derailing objections and applications.
39. That It is clear and prudent that matters costs can be heard and are always dealt with after the cause. It is not true that the Objectors have gone to sleep in this matter because the Objectors have always been in court ready for hearing of any matter in the proceedings, applications or otherwise. In the meantime, the Petitioner filed a land case in Eldoret against the Objectors that is Eldoret ELC No.346 of 2013 seeking for the eviction of the Objectors from the suit land since he subdivided the land parcels and registered the same in his name. While the Petitioner always seeks to frustrate the hearing and determination of this succession matter, he is always pushing for the land matters in Eldoret to proceed because he seeks their eviction there from.
40. That on the November 24, 2015 the ELC Judge sitting in Eldoret issued an Order that, the said land matter be stayed pending the hearing and determination of this succession cause. The Objectors are extremely prejudiced in the circumstances as the Petitioner continually tells court in Eldoret they the Objectors are not proceeding with the succession matter and hence the said court order should be discharged. The Objectors are at risk of the said order being discharged as they have nothing to show to the land court as there has been no progress in this succession court since the orders were issued on the November 25, 2015 as the succession cause has not taken off in any matter or at all in that duration of time.
41. That, the Petitioner filed submissions dated February 8, 2023 where he states that the respondents had gone to sleep since they enjoy interim protection orders. The Petitioner states that, he should be allowed to recover a sum of Ksh 120,000/ being taxed costs and further that the respondents failed to fix the application for hearing and determination.
42. It is their humble prayer that the Court should intervene in this matter, that the application dated July 18, 2019 is still pending and the same could not proceed as the Honorable Court had ordered matters costs to be determined separate of this matter. No further directions have been issued on the said application and the respondents could not fix the same for hearing. The Petitioner/Applicant is aware of that position and has referred the same in his submissions where he is asking which forum he should direct the issue of costs.



43. The Objectors submit further that, the Honorable Court proceeds in line with the order issued by the court concerning the application on costs. It is their prayer that the court orders this matter to proceed on merit before the issue of costs can be determined. It is their further submission that the court should make an order of costs in this matter after hearing and determining the same.
44. The Objectors submit that, this is a family matter where unless for any other special reasons each party normally bears their costs. That it is clear that the Petitioner having filed this succession cause is not interested in the matter proceeding to its logical conclusion. It is their prayer that the Application dated July 11, 2019 be dismissed with costs and the Honorable Court issues strict directions for the expedient hearing and determination of the succession matter.

### **Analysis and Determination**

45. Before I embark on this exercise this court sadly note that an irregular communication was inserted into the Court file by the Petitioner in person, referenced “Crying for the Delay to delivery of justice” dated August 24, 2022. This document was not properly filed, the same was never served upon the Objectors and this court shall disregard the same, as it is irregularly sneaked into the record denying an opportunity by the objectors to make representation thereby attempting to obtain undue advantage. The Petitioner is reprimanded and warned of such unbecoming behavior and urged not to engage in such shenanigans as this cause proceeds, the said document shall accordingly be expunged from the record and all parties are thus warned.
46. I have carefully considered the submissions by the parties and thus make the following observations;
  - a. The question of the Taxation of costs, being entertained within the cause was an unfortunate, regrettable and irregular and that the court by issuing the order dated April 1, 2019, that matters relating to the bill of costs, be expunged from the record, that the same be filed in a miscellaneous application and be canvassed independently from this matter and further that the succession cause be fixed for hearing on priority basis. This Order remedied the anomaly and was never challenged by the parties.
  - b. That the Petitioner/Applicant is subject to the court, by virtue of the grant made and issued, and should thus be interested in laying to rest the adverse allegations made against him in seeking the revocation, he however appears unperturbed and in no hurry to conclude the succession.
  - c. That the Petitioner admits in his pleadings of there being of other beneficiaries in the estate of the deceased, contradicting his earlier affidavit sworn on the November 4, 2008 where he deposed of being the only beneficiary.
  - d. That the Estate of the deceased comprise of land parcel No. Lembus/Torongo/402 that is subject of a land dispute by the parties herein High Court at Eldoret ELC No 346 of 2013 where the petitioner seeks to evict the Objectors having acquired the entire parcel by way of transmission in this cause.
  - e. That the Dispute in High Court at Eldoret ELC No 346 of 2013 is awaiting conclusion of the succession for the same to be determined by the Land Court.



47. In the case of *Nyamogo & Nyamogo Advocates v Pan Africa Insurance Company Limited & another* [2016] eKLR it was held that;

“A taxing officer exercises special jurisdiction of the court in taxing bills of costs. The jurisdiction is described as ‘special’ because under Section 2 of the *Advocates Act*, a ‘court’ is defined to mean the High Court and under Rule 49 of the *ARO*, a court is defined as means the High Court or any judge thereof or a resident Magistrate Court or any magistrate sitting as a member of a resident Magistrate Court and a taxing officer is not a court within the meaning of the two provisions. Consequently, anything that is ordinarily done by a ‘court’ cannot be done by a taxing officer, for example, determining questions of retainer, interlocutory applications such as joinder of parties, limitation of action, review and stay of execution”.

48. This Court is unpersuaded on the reasons submitted by the petitioner for striking out the Objectors Application and vacating the Orders thereon. The Court had already pronounced itself as to how the Taxation issue shall be dealt with.

49. Order 2 rule 15 of the *Civil Procedure Rules*, provides for the jurisdiction to strike-out pleadings. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process.

50. If the pleadings disclosed some cause of action or has raised some question fit to be decided, then it is appropriate that the case should be set down for trial, not matter how slight the chances are of succeeding.

51. The Court of Appeal in the *Crescent Construction Limited vs Kenya Commercial Bank Limited* [2019] eKLR, stated as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter. “or vary ex-parte judgment entered in default of appearance or defence, is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice”.

52. Rule 63 of the Probate and Administration Rules provide for the Application of *Civil Procedure Rules* and *High Court (Practice and Procedure) Rules* as hereunder;

- (1) Save as is 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 Order 5, rule 2 to 34 and Orders 11, 16,19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and



testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

53. Rule 59(1) and (2) of the *Probate and Administration Rules* provide for Nature of Pleadings in succession matters to include; a petition, caveat or summons as may be appropriate and in the case of a pending proceeding the court or a registrar may of its or his own motion or at the request of any party, but without a formal application, cause the matter to be set down for mention before the court or registrar upon notice to such persons (if any) as the court or registrar may direct.
54. The Court Notes the invocation of civil procedure rules inapplicable in this instance and the use of Notice of Motion by parties herein which pleadings have no place in succession cause.
55. The Decision by Hon. Justice A.K. Ndungu and Orders dated 1<sup>st</sup> April 2019 remain alive, have not been reviewed or appealed against and as such the taxation of costs issue shall be dealt with away from this succession in a separate miscellaneous Application.

### **Conclusion**

1. In the upshot I issue the following orders;
  - a. The Petitioner's Notice of Motion dated July 18, 2019 to strike out the Objectors is hereby dismissed for want of merit.
  - b. The Summons for revocation of Grant dated September 17, 2014 shall proceed for hearing and determination on a priority basis in the current session.
  - c. Parties are to obtain Two (2) consecutive hearing dates from the court administrator in the current high court session.
  - d. This being a family matter, parties shall bear their own costs.

It is So Ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 1<sup>ST</sup> SEPTEMBER 2023**

.....

**MOHOCHI S.M**

**JUDGE**

**In the presence of: -**

Mr. Gai, Advocate for the Objectors

Mr Arusei Advocate for the Petitioner

