



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Armstrong Kibet Rono (Deceased) (Succession Cause 11 of 2023) [2023] KEHC 23474 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 11 OF 2023
JRA WANANDA, J
OCTOBER 13, 2023**

IN THE MATTER OF THE ESTATE OF ARMSTRONG KIBET RONO (DECEASED)

BETWEEN

**VIOLET JEPTUM RAHEDI 1ST APPLICANT
GEOFFREY KIPCHUMBA KOSGEY 2ND APPLICANT
PHILOMENA KAPKORI 3RD APPLICANT**

AND

ELIZABETH JEMUTAI KANDIE RESPONDENT

RULING

1. Before Court is the Application by way of Notice of Motion dated 30/03/2023 seeking the following Orders:
 - a. [Spent]
 - b. That the Honourable Court be pleased to stay the proceedings in the Eldoret Chief Magistrates Court Succession Cause No. 269 of 2016, pending the hearing and determination of Eldama Ravine MC Criminal Case No. E975 of 2022.
 - c. That costs of this Application be in the cause.
2. The Application is filed through Messrs Chepseba Lagat & Associates Advocates and is stated to be brought under “Section 1A, 1B, 3A and 6 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya, Order 51 Rule 1 of the *Civil Procedure Rules* 2020 and all other enabling provisions of the law”.
3. The Grounds of the Application are as set out in the body thereof and the same is supported by the Affidavit sworn by the 1st Applicant, Violet Jeptum Rahedi as the main Affidavit and supported by the respective Affidavits sworn by the 2nd and 3rd Applicants. All three Affidavits are filed on 30/03/2023.



4. The main ground is that the birth certificates sought to be relied upon by the Respondent herein in the said Eldoret Chief Magistrates Court Succession Cause No. 269 of 2016 are under investigation before the Principal Magistrate's Court, Eldama Ravine in Criminal Case No. E975 of 2022 on alleged acts of forgery by the Respondent.
5. In the 1st Applicant's Affidavit, she depones that she filed the said Eldoret Chief Magistrates Court Succession Cause No. 269 of 2016 in respect to the estate of her late husband (Armstrong Kibet Rono) and obtained a Grant of Letters of Administration, the Respondent herein later filed an objection to the Grant, the Respondent filed her List of documents to be relied upon in the said case, namely, birth certificates of one Ron Kimut and one Don Chehelgo which documents are under investigation before the said criminal case, the birth certificates have been marked for identification, Section 6 of the [Civil Procedure Act](#) provides that no Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also in issue in another matter between the same parties, the documents in dispute and parties in the criminal case are the same as those before the Succession Cause. The 1st Applicant then exhibited copies of the relevant documents in support of her statements.

Response to the Application

6. The Application is opposed by the Respondent vide the Replying Affidavit filed in Court 8.5.2023 through Messrs Rioba Omboto & Co. Advocates. In the Affidavit, the Respondent deponed that in the year 2016 the Applicants secretly filed Succession proceedings in respect to the estate of the Respondent's late husband and later obtained grant of letters of administration intestate issued on 20/07/2017 and confirmed on 1/2/2018, the Respondent moved the High Court to revoke the grant of letters *vide* Eldoret High Court Misc. Application 33 of 2018 on the grounds that the proceedings to obtain the grant were defective in substance as the Respondent's two sons and the Respondent were excluded as beneficiaries/dependents, the Court in a Ruling delivered by Hon. Justice M. S. Githinji on 23/10/2019 agreed that the Respondent was a beneficiary to the estate, revoked the grant and restrained the Applicants from intermeddling with the estate but that despite the order, the Applicants continue to intermeddle with the estate.
7. The Respondent deponed further that she then filed an Application in the lower Court seeking to access her late husband's death gratuity from the Uasin Gishu County where her husband worked vide the said Succession Cause to enable her pay her children school fees, the trial Court directed that the matter be heard *viva voce* and that is when the Applicants raised the issue of forgery, thereafter she was charged in the criminal case, it is suspect that on 14/01/2023 the Respondent was arrested just 2 days to the hearing which was scheduled to be heard on 17/01/2023 without explanation as to the charges, she had never been called to shed light on any investigations, under Article 49 and 50 of the [Constitution](#) of Kenya she has the right to be informed of her charges and given time to respond, the Applicants have been taking the Court round in circles to delay the Succession Cause, allowing the present Application will be a prejudice to her right to fair trial, the 1st Applicant obtained the Respondent's husband's pension and/or death gratuity totalling Kshs 500,000/- and has misappropriated the same, the 1st Applicant has filed the present Application to cover her schemes of intermeddling with the estate, efforts to access the same has proved futile and her children continue to suffer as her late husband was the sole provider.
8. The Respondent invited the Court to scrutinize the Court records in Eldoret High Court Misc. Application 33 of 2018 and find that the same documents that the Applicants are alleging forgery of are the same documents that the High Court relied on as evidence in making its determination, the Applicants have never appealed nor reviewed the Ruling, the issue of forgery was only raised at the lower Court when the Respondent sought to access her late husband's properties, namely, L.R.



- No. Baringo/Sabatia/80 measuring 5 acres, the Applicants are circumventing the law to buy time to continue with their gimmicks, the Respondent's two sons are minors who need basic needs which the Respondent can barely afford and that delaying the civil case further will prejudice their best interest.
9. The Respondent further deponed that the 1st Applicant works with the Ethics & Anti-Corruption Commission (EACC) and has been using her position to harass and intimidate the Respondent, the mandate of EACC is to combat and prevent corruption through law enforcement in the public sector, the Respondent is not a civil servant nor does she work in any public office, it raises eyebrows why the EACC was investigating the matter which is purely a Succession matter, it is a conflict of interest that the complainant instructed EACC to investigate the matter, an institution that she works for.
 10. Finally, the Respondent deponed that the Courts have held that stay of proceedings impugns litigants' right to be heard without delay and right to fair trial and that the dispute has been criminalized with a view to giving the Applicants an upper hand in the case.

Applicants' Further Affidavit

11. In a rejoinder, the Applicant filed a Further Affidavit on 13/6/2023 wherein she contended that the Succession proceedings were not secretly filed since the same was notified in a gazette notice, the authenticity of the birth certificates is key in determination of the Succession proceedings, the Applicants are not in opposition to the Ruling of Githinji J delivered on 23/10/2019 but are only concerned with the outcome of the proceedings in the criminal case which is likely to affect the flow of events in the Succession Cause, the Applicants have not intermeddled with the estate, the statements relied upon do not expose any element of intermeddling, the Applicants did not raise the issue of forgery as alleged by the Respondent and it is the Applicant's Advocate who was informed of the same vide the letter dated 30/01/2023 from the office of the Director of Public Prosecutions (DPP), the Applicants are not in any manner related to the arrest of the Respondent, the Respondent ought to have brought out the issues of her arrest and failure to be informed of her rights in the criminal matter and not here, the issues raised by the Respondent are an afterthought and that the Applicants have not misappropriated the money as alleged.

Hearing of the Application

12. The Application was then canvassed by way of written Submissions. The Applicant filed hers on 13/6/2023 while the Respondent filed on 19/06/2023.

Applicants' Submissions

13. Counsel for the Applicants submitted that the Application is merited and cited Section 6 of the *Civil Procedure Act*, the Respondent is party to the two matters, namely, Criminal Case No. E975 of 2022 and Succession Cause No. 269 of 2016, the subject matter of the criminal case, being the birth certificates of the minors where the Respondent is charged with forgery of the same, are key to determination of the Succession Cause No. 269 of 2016, the matters are subject of *Res Judicata* because the decision of one matter will have a substantial effect on the other. He cited the cases of *Kinatwa Co-operative Savings and Credit Society Limited v Elizabeth Agidza & 2 others* [2012] eKLR, Civil Suit No. 3 of 2021, *Kenya Bankers Association versus Kenya Revenue Authority* 2019 eKLR, *David Ndii & others v Attorney General & others* [2021] eKLR, *ANN v RMK* (2021) eKLR, *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR.
14. Counsel submitted further that at no given point in time have the Applicants ever intermeddled with the estate, they have always acted in good faith pending the Court's completion on the issue



of distribution of the estate, an allegation of intermeddling is a grave one and requires proof beyond reasonable doubt and that the Respondent has tabled nothing as evidence in proof of the allegations. He cited Section 45 of the Law of Succession Act which deals with intermeddling and also the case of Benson Mutuma Muriungi v CEO, Kenya Police Sacco & Another [2016] eKLR.

15. In conclusion, Counsel cited Article 159(1)(d) of the Constitution and submitted that the Replying Affidavit filed by the Respondent argues on issues of procedural technicalities which are immaterial and that the said arguments are calculated towards confusing the Court and shifting its mind from the substantial issues raised by the Applicants.

Respondent' Submissions

16. Counsel for the Respondent submitted that a close scrutiny of the Applicant's pleadings filed herein reveals that the Applicants have tactfully chosen to conceal to this Court that they filed a similar Application dated 10/02/2023 before the lower Court, the Respondent filed a Notice of Preliminary Objection and the same was dismissed on 17/02/2023, the present Application is not an Appeal nor Review but a duplication of the Application earlier filed in the lower Court, the same orders that the Applicants are seeking in the present Application were dismissed in the lower Court. According to Counsel therefore, the matter is *Res Judicata*. He cited Section 7 of the Civil Procedure Act and "The Black's Law Dictionary, 10th Edition" and also the cases of Njangu v Wambugu and Another, Nairobi HCCC No. 2340 of 1991, Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary Liquidation) and Kamlesh Mansukhlal Pattni and Nicholas Njeru v The Attorney General and 8 Others, Civil Appeal No. 110 of 2011 [2013] eKLR. He submitted that if dissatisfied with the Ruling of the trial Magistrate, the Applicants had an avenue to appeal or seek a review against the decision and that to forum shop within Courts is a complete circumvent of the law.
17. On whether the Applicants have met the threshold for grant of stay orders, Counsel cited the cases of Kenya Wildlife Service v James Mutembei [2019] eKLR and Global Tours & Travels Limited; Nairobi Winding up Cause No. 43 of 2000 and submitted that stay of proceedings is a grave judicial matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial, it is a discretionary power to be exercised upon Courts considering facts and circumstances of each case, the Applicants are applying gimmicks to further delay and intermeddle with the estate, the Applicants are in the process of disposing off one of the properties of the estate, namely, L.R. Baringo/Sabatia/80, if the Court grants the orders the Respondent and her two sons who need basic needs which the Respondent can barely afford will be prejudiced, the Application is aimed at delaying the lower Court matter from proceeding to its logical conclusion.

Analysis and Determination

18. Before I identify the issues for determination, I note that, although the Application is framed as a Succession matter, the Application is brought entirely under the Civil Procedure Rules. It is important for litigants to appreciate that Succession matters are to be handled strictly under the Law of Succession Act, Cap 160 which is a self-regulatory statute and only the specified provisions of the Civil Procedure Rules are imported into it. On this point, I cite Rule 63 of the Probate and Administration Rules, which provides as follows: -

- “ 63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
 - (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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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.

19. In John Mundia Njoroge & 9 Others v. Cecilia Muthoni Njoroge & Another [2016] eKLR, Hon. Justice J. Mativo (as he then was) while analyzing the application of the said Rule 63 of the Probate and Administration Rules, stated as follows:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time.”

20. Nevertheless, since no objection in respect to the above point of law was taken and since under Article 159(2)(d) of the Constitution, one of the principles that is to guide the Courts is that “justice shall be administered without undue regard to procedural technicalities”, I will “close my eyes” to the said omission and proceed to determine the matter on its merits.

21. In view thereof, upon examination of the record and pleadings, including the Affidavits and respective parties’ Submissions filed, I find that the issue that arises for determination to be as follows:

“Whether the Applicants have demonstrated sufficient grounds to warrant the grant of orders of stay of proceedings of the ongoing lower Court matter, namely, Eldoret Chief Magistrates Succession Cause No. 269 of 2016”.

22. I now proceed to analyze and answer the said Issue.

23. In her Submissions, the Respondent has argued that the present Application is *Res Judicata* because the Applicants already filed a similar Application before the lower Court and that the Application, dated 10/02/2023, was dismissed on 17/02/2023. Curiously, the Respondent did not raise this issue in her Replying Affidavit and only brought it up at Submissions stage. For this reason, no copies of the alleged earlier Application nor the Ruling have been exhibited to enable the Court scrutinize the same and make a determination. The issue is, no doubt, one that would have an integral bearing on the Application and why the Respondent did not deem it fit to raise it in her Replying Affidavit, and instead only bring it up in her Submissions, is beyond my understanding.

24. In respect to the irregular practice of parties raising fresh matters at Submissions stage, Hon. Justice W. Korir (as he then was) in the case of Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties) [2020] eKLR, pronounced himself as follows:

“86. Moreover, submissions cannot be used as an avenue to raise new issues which have not been raised in pleadings, and therefore the petitioners cannot put forward any new claims against the 2nd Interested Party and the same are ignored.

87. In the case of Fibre Link Limited v Star Television Production Limited [2015] eKLR, it was held that submissions are not an avenue to submit evidence but must only be used to clarify issues. Furthermore, in the case of Clips Limited



v Brands Imports (Africa), Limited formerly named Brand Imports Limited
[2015] eKLR, Ogola J, held that:

“However, it is trite law that new issues cannot be raised in submissions. Korir, J in the case of *Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting And Training Limited & another* [2014] eKLR held that:

‘The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.’”

25. For the foregoing reasons, I will ignore the said portion of the Respondent’s Submissions.
26. Be that as it may, I am perturbed by the alien procedure adopted by the Applicants in approaching this High Court. The suit that they want this High Court to stay is before the Magistrates’ Court, a competent Court for that matter. I would have expected the Applicants, if they felt that the criminal case at Eldama Ravine ought to be stayed, to first move that Magistrate’s Court for an order to stay its own proceedings. If that Magistrates’ Court declined to grant such order, then, at that stage, the Applicants would be entitled to move to this High Court by way of Appeal. The Applicants did not even offer any explanation on why they chose to adopt the irregular procedure that they have adopted and neither did they allege that the Magistrates Court does not have the power to stay the proceedings.
27. To ignore or disregard the Magistrates Court which is lawfully seized of the matter and instead, jump to this High Court for a remedy which the Magistrates Court has full powers to grant is, in my view, an abuse of the process.
28. This ground alone is sufficient to dispose of this Application. However, I will still also briefly comment on the merits.
29. Regarding the merits, 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 (as he then was) 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.”



30. 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...”
31. 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.”
32. 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.”
33. 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.
34. Coming to the matter at hand, I note that the essence of the criminal case, namely, Eldama Ravine Magistrates Court Criminal Case No. E975 of 2022 in which the Respondent has been charged, is the alleged forgery of birth certificates for her two children. I also note that in revoking the Grant of



representation initially given to the Applicants in Eldoret High Court Misc Appl No. 33 of 2018, Hon. Justice S.N. Githinji J relied on the same birth certificates. The Judge stated as follows:

“The Applicant has demonstrated that her children and those of the late Rose Jepkoech Birech are the rightful heirs through the birth certificates, (emphasis own) affidavit of marriage and letter from the area chief, as well as the information on the eulogy.”

35. In the circumstances, I believe that I can therefore safely presume that the same birth certificates are the same that are now the subject of the criminal case. That being so, the Applicants have not offered any explanation why they never raised any challenges against the same birth certificates when they litigated before Hon. Justice Githinji. While there may be good reasons for not having raised such objection, no explanation was given to this Court. In light of that vacuum, this scenario lends credence to the Respondent’s allegation that the present Application is only calculated to delay the Succession Cause that is now sought to be stayed and in the process allow the Applicant to intermeddle or continue intermeddling in the estate. Needless to state, this comment should not in any way be construed to mean that I have made any determination on whether or not the birth certificates were forged. That shall be for the criminal Court to determine.
30. One may query what would happen if the hearing of the Magistrates’ Succession Court is allowed to proceed and that Court then determines the Succession Cause on the basis of the impugned birth certificates but then subsequently, the Criminal Court at Eldama Ravine finds that the birth certificates were in fact forgeries. Well, our judicial system has sound and solid mechanisms to deal with such an eventuality, including but not limited to, reviewing, vacating, revoking or setting aside any orders given.
31. In the circumstances, and considering that the deceased died way back in the year 2016, 7 years ago, weighing the opposing options available to me, I find that it will cause more suffering and prejudice to the parties if the stay is granted than if it is not granted. Staying the proceedings will only delay the matter further and hurt the already fatigued litigants. I find that it will serve the interests of justice more if the Magistrates Court Succession Cause is now allowed to be concluded.

Final Orders

32. In light of the above, I find that the Application for stay of proceedings, lacks merit. Accordingly, I make the following orders:
- i. The Application dated 30/3/2023 is hereby dismissed with costs to the Respondent.
 - ii. Eldoret Chief Magistrates Succession Cause No. 269 of 2016 is directed to proceed for hearing and determination.
 - iii. This file is now marked as closed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF OCTOBER 2023

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WANANDA J. R. ANURO

JUDGE

