



**Kimetto v Chepkwony & 2 others (Succession Cause 7 of 2018)
[2024] KEHC 14075 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 7 OF 2018
JK SERGON, J
NOVEMBER 7, 2024
IN THE MATTER OF THE ESTATE OF SAMWEL
CHEPKWONY KALIA ALIAS SAMWEL KALYA – DECEASED**

BETWEEN

EUNICE CHELANGAT KIMETTO PETITIONER

AND

ISHMAEL CHEPKWONY 1ST RESPONDENT

PAMELA CHEPKWONY 2ND RESPONDENT

ALICE CHEPKWONY 3RD RESPONDENT

RULING

1. The application coming up for determination is a chamber summons dated 2nd August, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this honourable court be pleased to grant leave to the petitioner/applicant to appeal against the decision/judgement of the court delivered on 1st August, 2024.
 - (iv) That this honourable court be pleased to stay execution of the judgement delivered by Justice J.K Sergon on 1st August, 2024 pending hearing and determination of the intended appeal.
 - (iv) That rent collection from all estate commercial properties be deposited in a joint account in the name of administrators pending hearing and determination of the intended appeal.
 - (v) That costs of this application be provided for



2. The application is supported by grounds on the face of it and the supporting affidavit of Eunice Chelangat Kimetto the applicant herein.
3. The applicant avers that on 1st August, 2024 this Court delivered a judgement in favour of the respondents and they were aggrieved and therefore wish to appeal the said decision at the Court of Appeal.
4. The applicant avers that she has reliable information that the respondents have entered into advanced stages of negotiation and sale of commercial property Kericho/Municipality L.R No. 631/19/III IR No 9590 (Stylex/Keromatt Building) to the tenants Keromatt Limited and Kericho Stylex Limited and that the tenants are part of the conspiracy to deny her and her sister of their rightful share of the deceased's property.
5. The applicant avers that the respondents have taken steps to tamper with the ownership of Litein Commercial Property L.R No. Kericho/Litein/8839/52 by transferring it to a third party in an attempt to defeat justice.
6. The applicant avers that any dealings in the properties by the respondents, including disposal will be prejudicial to the appeal as it will render the appeal nugatory and a mere academic exercise.
7. The applicant avers that she is aware that there is no automatic right of appeal from the decisions of the High Court to the Court of Appeal on probate and administration matters and therefore leave is mandatory before the appeal is filed.
8. The applicant avers that she has an arguable appeal with prospects of success as set out in her draft memorandum of appeal.
9. The applicant avers that it is in the interest of justice that the application be granted and the interim orders sought in the application granted.
10. Ishmael Chepkwony the 1st respondent with the authority of the 2nd and 3rd respondent filed a replying affidavit and preliminary objection in response to the application.
11. The respondent avers that the instant application was intended to deny the respondents the fruits of litigation as the applicant was seeking to introduce a new mode of distribution which is not agreeable to the parties.
12. The respondent avers that it is implausible and strange for the applicant to allege that the respondents had hatched a conspiracy to sell the commercial property Kericho/Municipality L.R No. 631/19/III IR No 9590 (Stylex/Keromatt Building) yet they have been in possession of the said property for a very long time and were not desirous of selling the said property.
13. The respondent avers that the certificate of grant issued and confirmed by this Court on 1st August, 2024 confirmed that the said properties are and were distributed by the deceased to the respondents prior to his demise.
14. The respondent avers that the allegations that they had taken steps to tamper with the ownership of Litein Commercial Property L.R No. Kericho/Litein/8839/52 is vexatious furthermore the applicant had not provided proof of the purported tampering.
15. The respondent avers that the allegations by the respondent that the tenants have been a part of the conspiracy to deny the applicant her rightful share of the deceased's estate are vexatious and uncalled for as the tenants were party to the suit as witnesses.



16. The respondent avers that in seeking leave to appeal the applicant is seeking to deny the respondents the right to own property as envisaged in article 40 of the constitution as the contested properties were distributed by the deceased prior to his demise which position was upheld by this Court.
17. The respondents filed a preliminary objection is based on the following grounds;
 - (i) That the applicant has not followed the right procedure for seeking leave to appeal the decision of this Honourable Court.
 - (ii) That the application is devoid of merit and a scheme by the applicant to deny the respondents fruit of judgement delivered on merit and not sufficient reason has been adduced to warrant a stay or the orders of this Honourable Court dated 1.8.2024.
 - (iii) That the application has been brought under the wrong provisions of the Law of Succession Act and Probate Rules.
 - (iv) That the application does not satisfy the legal tests for grant of stay of execution pending appeal as required under order 42 rule 6 of the Civil Procedure Rules.
 - (v) That from the clear implication of the application the applicant has repeated the same grounds of her petition which were conclusively dealt with and rejected on merit by this Honourable Court.
 - (vi) That the applicant is guilty of material non disclosure having failed to inform the court that the deceased gifted the applicant property in Kedowa Shopping Centre jointly with her two sisters Hellen Koech and Anna Bor where she has been collecting rent prior to the demise of the deceased and upon the demise of the deceased and non of the other beneficiaries had objected to this.
18. Amit Premchand Shah the director of Keromatt Limited a tenant of the respondents herein avers that having read the tenor, import and purport of the instant application wished to respond to the application to the extent that Keromatt Limited (hereinafter referred to as “the Company”) had been adversely mentioned.
19. He avers that it is fallacious for the petitioner/applicant to allege that the Company and the respondents are working in cahoots to defeat their interest in the estate property without presenting an iota of evidence buttressing this claim in court.
20. Milan Kantilal Gudhka the director of Kericho Stylex Limited a tenant of the respondents herein avers that having read the tenor, import and purport of the instant application wished to respond to the application to the extent that Kericho Stylex Limited (hereinafter referred to as “the Company”) had been adversely mentioned.
21. He avers that it is fallacious for the petitioner/applicant to allege that the Company and the respondents are working in cahoots to defeat their interest in the estate property without presenting an iota of evidence buttressing this claim in court.
22. The parties were directed to file written submissions.
23. At the time of writing this ruling, the respondents had complied and filed their submissions on the Case Tracking System.
24. The respondents submitted that rule 77 and 79 of the Court of Appeal Rules explicitly mandates that an intended appellant shall file a notice of appeal within fourteen (14) days of the judgement



- and serve it upon all persons directly affected by the appeal within seven (7) days of lodging. The respondents argued the the applicant did not serve the notice of appeal to all the affected beneficiaries and interested parties such as Kericho Stylex and Keromatt Ltd and therefore the failure to adhere to these procedural rules renders the application for stay procedurally defective thereby stripping this court of the jurisdiction to entertain the instant application. They cited the case of *In the Matter of the Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR where the court held that a stay application lacking a notice of appeal is procedurally unsound, as no legitimate appeal is in place. The respondents argued that an application for leave to appeal is typically premised in the existence of a notice of appeal.
25. The respondents argued that order 42 rule 6 of the Civil Procedure Rules requires an applicant to demonstrate substantial loss and provide sufficient cause to justify a stay of execution. They cited the case of *James Wangalwa & Anor v Agnes Naliaka Chesoto* [2012] eKLR, where the court highlighted that substantial loss is the cornerstone of any stay application and must be substantiated.
 26. The respondents argued that the applicant had not established a prima facie arguable case and that the memorandum of appeal, grounds of appeal are frivolous based on the findings of this court that the deceased had already distributed his property prior to his demise.
 27. I have considered the pleadings and submissions by the parties and find that the following issue (s) are ripe for determination; First, whether to grant leave to the petitioner/applicant to appeal against the decision/judgement of the court delivered on 1st August, 2024 and Secondly, whether to grant a stay execution of the judgement delivered by this Court on 1st August, 2024 pending hearing and determination of the intended appeal.
 28. On the issue as to whether to grant leave to the petitioner/applicant to appeal against the decision/judgement of the court delivered on 1st August, 2024. There is a substantial body of precedent that demonstrates that there is no express automatic right of appeal to the Court of Appeal in probate matters.
 29. In the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR the Court of Appeal held that; “In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court. We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.”
 30. This court, having thoroughly studied the draft memorandum of appeal, finds that the memorandum of appeal is drawn in a manner that indicates that the intended appeal raises arguable grounds. It is also the finding of this court that the deceased had already distributed his property prior to his demise, the commercial properties included.
 31. On the issue as to whether to grant a stay execution of the judgement delivered by Justice J.K Serгон on 1st August, 2024 pending hearing and determination of the intended appeal, whereas Rule 63 (1) of the Probate and Administration Rules has not cited Order 42 Rule 6 of the Civil Procedure Rules as one of the orders of the Civil Procedure Rules which apply to succession causes.
 32. This court may draw upon the wide powers in Section 47 of the *Law of Succession Act* to entertain any application and to determine any dispute under the *Law of Succession Act*.



- 33. Additionally this court may, in appropriate instances, draw upon its inherent jurisdiction to grant appropriate orders under Rule 73 of the Probate and Administration Rules in order to meet the ends of justice and to prevent abuse of process of the court. These provisions are in perfect conformity with *the Constitution* of Kenya, 2010 specifically article 159 of *the Constitution* which states that courts of law should strive to administer substantive justice.
- 34. However, in the instant application, the applicants herein have not filed notice of appeal which renders the application for stay and leave to appeal to be procedurally defective thereby stripping this court of the jurisdiction to entertain the said application.
- 35. In the end, the summons dated 2nd August, 2024 is found to be without merit. It is dismissed with each party bearing their costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Ruto

Kiletyen for the Respondent

Kirui holding brief for J. K. Mutai for Applicant

