REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 59 OF 2007

IN THE MATTER OF THE ESTATE OF WILLIAM KIPKOSGEI KIPTUM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION PENDING APPEAL

BETWEEN

EUNICE CHEBICHII KIPKOSGEI.....1ST PETITIONER

VIOLAH CHERUTO KIPTUM.....2ND PETITIONER

AND

ESTHER JEPTANUI KIPTOO.....1ST OBJECTOR

EDNA JESANG KOSGEI.....2ND OBJECTOR

RULING

[1] Before the Court for determination is the application dated **24 September 2020.** It was filed by the Petitioners**, Eunice Chebichii Kipkosgei and Violah Cheruto Kiptum,** pursuant to **Articles 48, 50(1), 159 and 165** of the **Constitution of Kenya; Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, and Order 42 Rule 6** of the **Civil Procedure Rules** for the following orders:

[a] Spent

[b] Spent

[c] Spent

[d] There be a stay of the Judgment delivered on **8th November 2019** and any further proceedings in this matter pending *inter partes* hearing and determination of the intended appeal and confirmation of grant in the instant matter.

[e] The Objectors/Respondents be restrained from interfering with the possession, occupation and use of the assets forming part of the estate of the deceased which include but are not limited to land title numbers **Moiben/Moiben Block 5(Merewet)153, Moiben/Moiben Block 5(Merewet)228** and **Moiben/Moiben Block 5(Merewet)257** pending the hearing and determination of the intended appeal and confirmation of grant in the instant matter.

[f] Costs of the application be awarded to the Petitioners.

[2] The application was premised on the grounds set out on the face thereof, which grounds were adverted to in the Supporting Affidavit sworn by the 1st Petitioner on **24 September 2020** and the Further Affidavit sworn on **12 October 2020**. The 1st Petitioner reiterated their stance that the respondents were unknown to them prior to the filing of their objection application herein; and that they are dissatisfied with the Judgment of the Court dated **8 November 2019** by which the Objectors were recognized as beneficiaries of the estate of the deceased;

and have therefore appealed the same. The Petitioners further averred that the Objectors have recently tried to trespass onto the parcels of land forming the estate of the deceased, notwithstanding that distribution thereof is pending. They were particularly aggrieved that the Objectors tried to lease out a portion of the deceased's estate to one **Boaz Kiplimo;** and that it took the intervention of the area chief to thwart their efforts.

[3] The 1st Petitioner also pointed out that the Objectors have never been in possession, occupation or use of any of the properties comprising the deceased's estate; and therefore that their interest therein is only avaricious; which, if allowed will occasion the legitimate beneficiaries of the deceased untold suffering. They are convinced that their appeal has high chances of success and will be rendered nugatory unless the orders sought by them are granted. The 1st Petitioner annexed to her affidavits copies of the Notice of Appeal and the Memorandum of Appeal, among other documents, to augment her averments.

[4] In response to the application, the Respondents relied on the Further Replying Affidavit sworn by the 1st Respondent on **26 October 2020**. She averred that, being the 1st widow to the deceased she petitioned for grant vide **Eldoret High Court Succession Cause No. 67 of 2007;** not knowing that the 1st Petitioner had already filed this Cause. She further pointed out that the Court then issued directions for the consolidation of the two matters, and that this file be treated as the lead file. She therefore insisted that she is not just an objector *per se* but a cross-petitioner in the matter.

[5] The 1st Respondent further averred that she has all along been utilizing 20 acres in the property known as **Moiben/Moiben Block 5 (Merewet)228;** while the Petitioners are in full control and occupation of the other two assets measuring about 100 acres as well as parcel number **Sergoit/Koiwaptaoi Block 2(Senetwet)23** which has not been included in the list of the deceased's assets in these proceedings. According to the Respondents, it is the Petitioners who have been intermeddling with the estate; having sold land parcel number **Moiben/Moiben Block 5(Merewet)153** to one **Nicholas Chirchir**. They asserted that they have equal rights to administer the estate pending confirmation and distribution; and, therefore, that the application for stay has only been brought to frustrate her and her daughter. She urged for the dismissal of the Petitioners' application for stay.

[6] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **7 October 2020**. In the written submissions filed on behalf of the Petitioners by **Mr. Kenei**, the following issues were proposed for determination:

[a] Whether the Petitioners have an arguable appeal;

[b] Whether the intended appeal will be rendered nugatory if stay is not granted;

[c] Whether a temporary injunction should be issued to preserve the current status of the deceased's estate;

[d] Whether the doctrine of *Lis Pendens* is applicable in the instant case.

[7] Counsel urged the Court to find that the appeal raises serious issues warranting the intervention of the Court of Appeal; and in support of the proposition that even one such ground is sufficient, reliance was placed on **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union**, Nairobi Civil Application No. 72 of 2001; and **Mainkam Limited & Another vs. Multichoice Kenya Limited** [2020] eKLR. Counsel also submitted that, since the appeal is seeking to challenge the inclusion of the Objectors as beneficiaries, the appeal will be rendered nugatory should the Court proceed with confirmation and distribution before the disposal of the appeal. Counsel relied on **Ian Gakoi Maina & 3 Others vs. Republic & Another** [2020] eKLR and **Reliance Bank Ltd vs. Norlake Investments Ltd** [2002] EA 227 to support his argument that the Petitioners stand to suffer needless hardships unless stay is granted.

[8] With regard to the prayer for temporary injunction, it was **Mr. Kenei's** submission that **Rule 73** of the **Probate and Administration Rules** grants the Court the powers to make such orders as are necessary for the preservation of the estate, including temporary injunctions. He urged the Court to note that the Petitioners are not seeking to change anything but are merely seeking to have the current *status quo* preserved during the pendency of the appeal. In his view, the Petitioners have satisfied the conditions for the grant of a temporary injunction in terms of the parameters set in the cases of **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358; **Mrao Ltd vs. First American Bank of Kenya & 2 Others** [2003] KLR 125; **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR and **Suleiman vs. Amboseli Resort Ltd** [2004] 2 KLR 589.

[9] On the applicability of the doctrine of *Lis Pendens*, **Mr. Kenei** made reference to the case of **Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another** [2015] eKLR to support his submission that the doctrine is still applicable notwithstanding the repeal of **Section 52** of the **Indian Transfer of Property Act** by the **Land Registration Act, No. 3 of 2013**; it being a common law principle. He reiterated the need to protect the substratum of the instant cause pending appeal.

[10] Ms. Tum, learned counsel for the Respondents, likewise, relied on her written submissions dated **26 October 2020**. She proposed the following two issues for determination:

[a] Whether the Respondents are dependants of the estate of the deceased, **William Kipkosgei Kiptum**; and,

[b] Whether the present application meets the conditions for grant of the order of stay of execution.

[11] According to **Ms. Tum**, there is no dispute that the Respondents are the 1st widow and daughter of the late **William Kipkosgei Kiptum**; and therefore are beneficiaries of the estate of the deceased for purposes of **Section 29(a)** of the **Law of Succession Act**. She, consequently, submitted that the two are equally entitled to inherit from the estate alongside the Petitioners. She urged the Court to note that although the estate is vast, measuring over 100 acres in size, the Respondents are seeking to utilize only 20 acres thereof pending distribution. She also pointed out that the Respondents have already been prejudiced and would be subjected to further suffering should the

application be allowed.

[12] It was further the submission of **Ms. Tum** that the Respondents are the successful litigants, and are therefore entitled to the enjoyment of the fruits of their successful litigation. In her view, the Petitioners have not availed sufficient proof of substantial loss, granted that the Respondents only seek to continue utilizing 20 acres of Parcel No. **Moiben/Moiben Block 5(Merewet)228,** which portion will still be available for distribution at the opportune time. Counsel relied on **Samvir Trustee Limited vs. Guardian Bank Limited** [2007] eKLR and **Re Estate of Penina Teriki Chepkurgat (deceased)** [2020] eKLR, for the proposition that it is not enough for the Petitioners to merely allege that they stand to suffer substantial loss in the absence of empirical proof thereof; and that the Petitioners needed to show that the execution will create a state of affairs that will irreparably negate a successful outcome in the appeal.

[13] Lastly, it was the submission of **Ms. Tum** that the Petitioners have not committed themselves to furnishing security for the performance of the Judgment of the Court or abiding by such terms as to security as the Court may, in its discretion, impose. She further urged the Court to note that the application has been brought one year after the delivery of the impugned Judgment. She accordingly urged for the dismissal of the application dated **24 September 2020** with costs to the Respondents.

[14] I have given careful consideration to the application, the averments in the affidavits filed herein in respect thereof, including their annexures, and the written submissions filed by learned counsel. Whereas the application is expressed to have been brought pursuant to **Articles 48, 50(1), 159 and 165** of the **Constitution of Kenya; Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, and Order 42 Rule 6** of the **Civil Procedure Rules,** it cannot be overemphasized that the **Law of Succession Act, Chapter 160** of the Laws of Kenya is, in the main, a stand-alone piece of legislation; and that, other than those provisions that have been imported under **Rule 63** of the **Probate and Administration Rules,** the rules of procedure as provided for in the **Civil Procedure Rules** are inapplicable. Thus, in **Josephine Wambui Wanyoike vs. Margaret Wanjira Kamau & Another [2013] eKLR,** the Court of Appeal restated this position thus:

> **We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1).**

There must have been a good reason for that…"

[15] Thus, **Rule 63(1)** of the **Probate and Administration Rules** is explicit that:

> **"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."**

[16] Thus, the instant application can only be looked at from the prism of **Section 47** of the **Law of Succession Act** and **Rule 73** of the Probate and Administration Rules; which in my considered view, suffice for its purposes. **Section 47** provides that:

> **"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**
>
> **Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.**

[17] On the other hand, **Rule 73** of the **Probate and Administration Rules** stipulates that:

> **"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."**

[18] I would accordingly agree with what **Hon. Ouko, J.** (as he then was) had to say in **Re Estate of George M'Mboroki** Meru HCSC No. 357 of 2004:

> **"The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."**

[19] That said, a question was posed by **Mr. Kenei** as to the applicability of the doctrine of *Lis Pendens*; and, while I note that **Ms. Tum** did not specifically respond to **Mr. Kenei's** submissions in that regard, I entertain no doubt that the doctrine is indeed applicable in Kenya, notwithstanding the repeal of the **ITPA**; it being a common law doctrine. It is however tenuous whether it was correctly pleaded within the context of the instant application. In **Mawji vs. US International University & Another** [1976] KLR 185, it was held thus:

> **"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good**

effective administration of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"

[20] With due respect to **Mr. Kenei,** the subject property is estate property to which both sides of this controversy have an equal interest. This Court has already made a determination that the Respondents rank in *pari passu* with the Petitioners and that they have an equal right to administer and benefit from the deceased's estate. Moreover, there is no evidence that the Respondents are intent on disposing of any of the estate assets or that such disposal is imminent. The truth of the matter is that there is no way the Respondents can dispose of the estate property before confirmation of grant as that would amount to an offence under **Section 45** of the **Law of Succession Act;** which is explicit that:

"(1) Except in so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

[21] Moreover, the proviso to **Section 82** of the **Law of Succession Act** is clear that **"...no immovable property shall be sold before confirmation of grant..."** In the instant proceedings, the parties are yet to apply for confirmation of grant; and as joint administrators, no such step can be taken by the Respondents without the knowledge and cooperation of the Petitioners. It is for the foregoing reasons that I find the doctrine inapplicable to the circumstances of the instant application.

[22] Since the Court has already made its determination and found that the Respondents are beneficiaries of the estate of the deceased, the first issue proposed by **Ms. Tum** is a non-issue. Thus, the only issue for determination is whether it is necessary, for the ends of justice, for the Court to issue the orders prayed for in the application dated **24 September 2020.**

[23] From the documents exhibited in respect of the application, the Petitioners have demonstrated that they filed a Notice of Appeal pursuant to **Rule 75** of the **Court of Appeal Rules** on **19 November 2019** as well as a Memorandum of Appeal dated **9 October 2020**. As to whether that appeal has overwhelming chances of success is not for this Court to determine; for that is the preserve of the appellate court. Indeed, it is noteworthy that the authorities cited by **Mr. Kenei** in this regard, namely, **Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union**; **Mainkam Limited & Another vs. Multichoice Kenya Limited** [2020] eKLR; **Ian Gakoi Maina & 3 Others vs. Republic & Another** [2020] eKLR and **Reliance Bank Ltd vs. Norlake Investments Ltd** [2002] EA 227 are all decisions of the Court of Appeal, made pursuant to Rule 5(2) (a) and (b) of the Court of Appeal Rules.

[24] I have nevertheless considered and weighed the competing interests of the parties. On the one hand, the Petitioners are averse to the inclusion of the Respondents as administrators and beneficiaries of the deceased. They annexed certain photographs to their Further Affidavit to show that the 1st Petitioner had cultivated maize on the subject parcels of land; and that any attempt by the Respondents to access properties would lead to extensive losses on her part. The Respondents have however made it clear that they are not interested, in the interim, on all the three parcels of land. They prayed that they be allowed to utilize 20 acres of the one parcel of land known as **Moiben/Moiben Block 5 (Merewet)228** pending the outcome of the appeal. That proposal by the Respondents is not unreasonable in my view.

[25] In **Re Estate of Nasotokini Ole Sane (Deceased)** [2020] eKLR in which an application for stay pending appeal was made, **Hon. Mwita, J.** took the following view, which I entirely agree with:

"9. …the Court, in considering an application for stay of execution, exercises judicial discretion which it should exercise judiciously. And whether or not to grant stay, the Court must consider the circumstances of the case, the essence being, to do justice to the parties.

10. The Applicants are dissatisfied with the decision of this court and want to exercise their statutory right of appeal. In the impugned judgment, the court ordered that some 16 acres be transferred to the Respondents within 90 days. In default the court ordered the Deputy Registrar of this court to execute documents to facilitate compliance with the decree.

11. The judgment requires the Applicants to give sixteen acres of land to the Respondents which are to be excised from the parcel of land, the subject of these succession proceedings. If execution takes place it means the applicant's appeal will face complications. Should the Court of Appeal overturn this court's decision there would have to be a cancellation of the sub-divisions already carried out and the transfers effected in execution of this court's decree.

12. In the circumstances, I do not find overwhelming hindrance, to dissuade this court from granting stay so that the appeal, if filed may not be rendered nugatory. Rather, I am persuaded that it would be in the interest of justice to grant stay of execution, but on certain conditions. This is so because from the reading of the judgment, it is clear that the parties have still to go on and confirm the grant before distributing the estate. It will therefore be appropriate to obviate a situation where parties are held in abeyance indefinitely, not knowing when the Court of Appeal will determine the appeal…"

[26] Moreover, in **Mugar vs. Kunga** [1988] KLR the Court of Appeal appreciated the emotive nature of land disputes and the need for parties to be given the opportunity to fully ventilate their grievances. It held that:

"The practice of the Court of Appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined."

[27] In the premises, the justice of the case would require that there be an order for stay of execution and proceedings herein as prayed pending the hearing and determination of the appeal; and that, as a condition for the stay order, the Respondents be allowed to continue utilizing the 20 acres aforementioned pending the hearing and determination of the appeal. In the premises, the prayer for temporary injunction is untenable and is hereby dismissed.

[28] Thus, the orders that commend themselves to me, and which I hereby make in respect of the application dated **24 September 2020,** are as hereunder:

> **[a]** That there be a stay of execution of the Judgment delivered on **8 November 2019** and any further proceedings in this matter pending the hearing and determination of the intended appeal.
>
> **[b]** The Respondents shall continue utilizing the portion of **Land Parcel No. Moiben/Moiben Block 5 (Merewet)228** measuring 20 acres without let or hindrance pending the hearing and determination of the appeal.
>
> **[f]** Costs of the application be borne by the estate.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE