



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

SUCCESSION CAUSE NO. 2 OF 2017

IN THE ESTATE OF JONATHAN KIPRUTO CHEMJOR (DECEASED)

SARAH WANJIRU GITICHI.....OBJECTOR/RESPONDENT

VERSUS

TOM KIPTOO CHEMJOR.....1ST PETITIONER/RESPONDENT

KENNETH KIBET CHEMJOR.....2ND PETITIONER/RESPONDENT

RULING

Pursuant to the provisions of section 1A, 1B, 3 and 3A of the Civil Procedure Act, [Cap 21] Laws of Kenya, Order 40 of the Civil Procedure Rules and Rules 49, 70, and 73 of the Probate and Administration Rules, the applicant seeks the following orders from this court.

1) *spent*

2) *spent*

3) An order to stay further proceedings, ruling/judgement and any other consequential orders pending the hearing and determination of Eldama Ravine Magistrate's Court Criminal Case No 871161 of 2021, Republic v Sarah Wanjiru Gitichi

4) An order to set aside the ex parte proceedings herein and the hearing to start afresh (de novo).

The application is supported by nine (9) grounds that are set out on the face of the notice of motion and thirteen paragraphs (13) supporting affidavit of the 1st petitioner/respondent.

The major grounds in support of the application are as follows. The succession proceedings proceeded on the basis of documents (a letter from the area chief and a birth certificate of the minor) which were a forgery and the objector is now facing criminal charges in Criminal Case No.871161 of 2021 in Eldama Ravine Magistrate's Court, Republic v Sarah Wanjiru Gitichi.

Furthermore, it is judicious for this court to grant a stay of further proceedings, rulings, judgements and such further orders that are likely to change the stratum of the estate. Additionally, the estate will suffer prejudice if the court proceeds with further hearing and determinations.

It is in the interest of preserving the estate and the integrity of the court that the prayers sought be granted. The orders sought are necessary to prevent the abuse of the court process. And finally, if the criminal charges are proved against the objector/respondent, the estate will suffer loss and damage.

In addition to the foregoing grounds the application is supported by a thirteen paragraphs (13) supporting affidavit of the 1st petitioner/applicant, whose major averments are as follows. The objector/respondent holds two death certificates which were used in these succession proceedings and are now the subject of forgery charges in the criminal proceedings in the lower court against the objector/respondent.

The objector/respondent also holds two letters from the area chief which were used in the succession proceedings and are now the subject of forgery charges in the criminal proceedings in the lower court against the objector/respondent. Furthermore, the objector/respondent also holds three birth certificates which were used in these succession proceedings and are now the subject of forgery charges in the criminal proceedings in the lower court against the objector/respondent.

The objector/respondent is charged with six charges which are as follows. Count 1 charges the objector/respondent with giving false information to a person employed in the public service (administration chief Gideon Chemjor) in relation to the issue of being married to the deceased in the instant succession cause. Count 2 charges the objector/respondent with giving false information to a person employed in the public service (John Mwangala, registrar of births and deaths) in relation to a late application for a birth certificate of a minor (Ruth Jerono), who is alleged to be a beneficiary in the instant succession cause.

Count 3 charges the objector/respondent with giving false information to a person employed in the public service (police officer No. 87321 PC Solomon Lagat) in relation to allegedly being married to the late Jonathan Chemjor, who is the deceased in the instant succession cause. Count 4 charges the objector/respondent with making a false document in relation to a birth certificate of a child Ruth Jerono; by inserting in the birth certificate of the said child the name of the deceased father Jonathan Kipruto Chemjor; which originally was not there.

Count 5 charges the objector/respondent with making a false document in relation to changing the birth certificate of Ruth Njeri to read Ruth Jerono.

Count 6 charges the objector/respondent with giving false information in relation to causing the civil registrar of births (Mr. John Mwangala) to affix his digital signature to a birth certificate when it was to her knowledge that there was in existence an original birth certificate; which related to the same child.

Finally, the remaining averments are a replica of the matters that are set out on the face of the notice of motion as grounds in support of the application; which I find unnecessary to set out herein.

The submissions of the petitioners/applicants.

Messrs Ouma & Company advocates for the applicants have urged the court to grant the orders sought in order to preserve the integrity of the court. It is counsel's submission based on section 76 of the Law of Succession Act (Cap 160) that there exists material facts that were not disclosed to the court during the confirmation hearings which are as follows.

First, the proceedings are defective in substance in that the authenticity of the documents relied upon namely the chief's letter, the death and birth certificates are the subject of the criminal proceedings in the lower court; which is pending hearing and determination.

Second, the objector has **concealed material facts relating to the identity of the beneficiary, who according to counsel had multiple identities and documents.**

Thirdly, there is pending hearing and determination a criminal case in Eldama Ravine court touching on the authenticity of the documents relied upon by the objector in the current succession cause proceedings.

Finally, counsel cited *Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) e-KLR*, in which the court cited with approval the circumstances in which a court may revoke or annul a grant of representation; which circumstances include the following. First, where the proceedings, to obtain the grant, were defective in substance. Second, where the grant, was obtained fraudulently by the making of false statements, or by the concealment from the court of something material to the case. Third, where the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, notwithstanding that the allegation was made in ignorance or inadvertently.

The case for the objector/respondent

The objector filed a 71 paragraphs replying affidavit in opposition to the application. Additionally, the objector also filed a 35 paragraphs replying affidavit of her daughter in opposition to the application.

The major averments in the replying affidavit of the objector are as follows. In Eldama Ravine PMCC succession cause No. 32 of 2014 which was filed by the applicants, omitted from the list of assets some properties of the estate of the deceased. After unsuccessfully negotiating an out of court settlement in that cause, it was transferred from the magisterial court and she then filed it in this court. In that cause the applicants named the daughter of the objector as the sole beneficiary of the estate of the deceased, who was her father. There has never been any doubt about it.

Furthermore, the deponent has also deposed that the applicants educated the minor beneficiary in this cause and they also knew that the minor beneficiary was called Ruth Njeri in her original birth certificate. The applicants in their affidavit dated 9th January 2018 in paragraphs 10, 13, and 19 deposed that the properties of the deceased should be bequeathed to the minor beneficiary upon her attaining the age of majority. The applicants have now changed their mind and are now frustrating the minor beneficiary.

The objector has further deposed that although she co-habited with the deceased as husband and wife respectively, she was not seeking any beneficial interest in the estate of the deceased. She is only protecting what is due to her daughter who was a minor at that time. That in the application for confirmation of grant dated 7th March 2019 the applicants stated that all the properties of the estate the instant deceased were to be bequeathed to the minor beneficiary (Ruth Jerono). The objector filed a protest dated 5th July 2019 in which she raised the issue of the property known as Lembus/Kabimoi/305, which had been left out from the list of the assets of the estate. In response to the said protest the co-petitioner (Kenneth Kibet Chemjor) replied vide their affidavit dated 14th October 2019 at paragraph 8 denying that the said property belonged to the estate of their late father and that distribution had not been done. At paragraph 10 of the said affidavit, Kenneth Kibet Chemjor, misled the court in stating that his sister Nancy was living on the said parcel of land; which was the property of the estate of the deceased.

The objector has further deposed that the petitioner unlawfully sold land parcel No. Lembus/Kabimoi/305 to one David Kipng'eno; a matter in respect of which the objector reported to the police as per Eldama Ravine police station OB No. 37/21/11/2019. And this is why the said property was left out in the list of assets of the deceased.

The objector has further deposed that the instant application and her arrest in Eldama Ravine is out of malice and that she is ready to defend herself. And that there is no provision in law, that prevents the grant from being confirmed.

The applicants were served with a hearing notice but they failed to attend court and cannot now purport to stay the proceedings that they chose not to attend.

The applicants have raised the issue of birth certificates which has been raised before in this court on a number of occasions and it was on the advice of the deponent that the objector changed her daughter's name from Ruth Njeri to Ruth Jerono in accordance with the culture of the applicants. The applicants also wanted the name of his deceased brother to appear in the birth certificate, to which the objector has annexed the relevant correspondence marked "SWG5". The objector has in that regard has deposed:

"THAT it is clear from the said correspondences that he sent a copy of the surrender of the deceased's identity card and death certificate to assist in the processing of the birth certificate." And further:

"THAT Ruth was the name of the Applicant's mother and Njeri is the name of my mother. Jerono was proposed by the Child's father's relative called Julia in accordance with the culture and the time the child was born and he fondly called her by the said name."

The objector has deposed that she followed the due process and surrendered the birth certificate bearing the name Ruth Njeri and her daughter has one birth certificate bearing the name Ruth Jerono Kipruto. She has further deposed that there is no connection between the criminal case as the sole beneficiary is not an accused person in the criminal case in any event.

Furthermore, the objector has deposed following advice from her advocate that a party is presumed innocent until he is proved guilty. The objector has further deposed that the minor beneficiary in the instant application is now 19 years old and is entitled to inherit the estate of her deceased father.

Finally, the objector has prayed that the court proceeds to deliver its judgement as the criminal case has nothing to do with Ruto Jerono Kipruto and that the interest of the objector is limited to protecting the interests of the minor beneficiary.

The deposition of Ruth Jerono Kipruto.

Ruth Jerono Kipruto has deposed that she is the daughter of the deceased and the objector herein and that she is the sole beneficiary of the estate of her deceased father.

She has deposed to the following matters. She has always lived with her mother after the death of her father. She has also deposed that she was named Ruth after her paternal grandmother and Njeri after her maternal grandmother. Her uncle wanted her birth certificate to bear the name of his brother as he had proposed to take her to Canada where he lives.

She has also deposed that her mother (the objector) told her that it was possible to change her name to reflect the identity of her father Kipruto Chemjor and the process of changing the name was followed. She then proceeded to obtain her national identity card bearing the names Ruth Jerono Kipruto. Following the death of her father, her uncle namely Tom Kiptoo Chemjor (the co-applicant herein) paid her school fees in classes 5 to 8 and that he used to visit her in school.

The deponent has deposed that during her father's burial she was stood up and was recognized as the only child of her late father, which burial was also attended by her mother (the objector).

The deponent has also annexed the obituary of his father annexed to her affidavit and marked as annex "RJK".

Furthermore, the deponent has deposed that she has learnt that because of her father's properties her uncles (the petitioners/applicants herein) now want to disown her and are even asking for a paternity test. And they have also filed criminal charges against her mother for the sole reason of denying her the inheritance from her deceased father; which she needs for her further education.

She further deposed that all the properties due to her from the estate of her father be transferred to her and be put in the name of her mother and herself; since she has solely been taking care of her. Additionally, it is only her mother she can trust.

She has also deposed that the money held by the Public Trustee be put in an account to be operated by her mother and herself for her benefit now that she is of the age of majority and able to manage her own affairs.

It is for the foregoing reasons that she prays that the application be dismissed on account of being vexatious, malicious and devoid of merit.

Additionally, she prays that the court proceeds to deliver its judgement

The submissions of the objector/protestor.

Messrs G.C. Nyongesa advocates for the objector filed written submissions and urged the court to dismiss the application for lacking in merit.

It was the submission of counsel that this cause has been in court for the last 8 years when there is only one beneficiary to the estate of the deceased. It is her further submission that the applicants filed in Eldama Ravine PMCC Succession cause No. 32 of 2014 in respect of the estate of Jonathan Kipruto Chemjor. The deceased died intestate and was survived by Ruth Jerono Kipruto, her daughter.

The objector filed the instant objection proceedings because the applicants had left out some properties of the estate. The court then gave directions on how the objection was to be disposed of and the applicants failed to attend the court despite being served with the hearing notice. The applicants only surfaced in court when the instant objection application was pending judgement.

Furthermore, counsel submitted that the instant application is fatally defective as it was filed by way of notice of motion; when the law requires that it should have been filed by way of summons. Secondly, the application is also defective because only one applicant namely Tom Kiptoo Chemjor filed a deposition (an affidavit) without the written authority of the co-applicant (Kenneth Kibet Chemjor).

Furthermore, counsel submitted that the issue of the birth certificate is res judicata; since the court ruled upon it and in its ruling dated 26/05/2020 in which the court directed that as there was one beneficiary (Ruth Jerono) the applicants were at liberty to file a formal application for a paternity test. Counsel has therefore submitted that since they have not filed a formal application for a paternity test the doctrine of res judicata applies.

The affidavits of the objector and sole beneficiary have raised issues which have not been controverted by the applicants; since the change of the beneficiary's name from Ruth Njeri to Ruth Jerono was done with the consent and full knowledge of the applicants. Additionally, the applicants have all along recognized the sole beneficiary as the only child of the deceased; they are now stopped from raising the issue of paternity at the instant stage.

It is counsel's further submission that the criminal case against the objector cannot in law be the basis for the grant of an order of stay or delaying of the confirmation of the grant in view of the constitutional presumption of innocence that is embodied in article 50 (2) (a) of the 2010 Constitution of Kenya. Even if the objector were to be convicted the right of the sole beneficiary to inherit her father's estate will not be affected now that she has attained the majority age. It is also counsel's submission that the applicants are abusing the court process. The sole beneficiary is entitled to inherit by virtue of section 29 of the Law of Succession Act.

Counsel has additionally submitted that there are no sufficient grounds to warrant the grant of the orders sought for the following reasons. First, the applicants applied for and obtained a grant of letters of administration. There is no application by them seeking to revoke or stay the confirmation of the said grant. The grant was obtained to administer the estate on behalf of the sole beneficiary, which they proceeded to apply for its confirmation.

Counsel cited Halsbury's Laws of England, 4th edition, vol. 37 page 330 and 332, in which the authors observed that the power to stay proceedings ought to be exercised sparingly and only in exceptional case. Counsel also cited Global Tours & Travels Ltd; Nairobi HC Winding up Cause No. 43 of 2000, in which this court (Ring'era, J) observed in respect of whether to grant stay of proceedings or further proceedings on a decree or order appealed from stated that the court ought to consider amongst other matters, the need for expeditious disposal of cases, the merits of the appeal, the scarcity and optimum utilization of judicial time.

Counsel has therefore urged the court to dismiss the application as it amounts to an abuse of the court process and is a delaying tactic. Counsel has also submitted that the sole beneficiary is now an adult who is capable of managing her affairs and should not be denied her rights because of selfish interests.

Finally, counsel has urged the court to order that the grant be confirmed in the terms stipulated by the objector/protestor.

Issues for determination

I have considered the affidavits of the parties, their submissions including the authorities cited and the applicable law.

I find the following to be the issues for determination.

1. Whether the petitioners/applicants have made out a case for the grant of an order to stay further proceedings, ruling/judgement and any other consequential orders pending the hearing and determination of Eldama Ravine Magistrate's Court Criminal Case No 871161 of 2021, Republic v Sarah Wanjiru Gitichi.
2. Whether a case has been made out for the grant of an order to set aside the ex parte proceedings herein and the hearing and determination of the objection proceedings to start afresh (de novo).

Issue 1

1. The issue as to whether this court should stay its proceedings, including an order to stay the delivery of its judgement pending the hearing and determination of the criminal proceedings has been legislated upon in section 193A of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides for concurrent trials of the criminal and civil cases, notwithstanding the provisions of any other written law and the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings. Before this enactment, the law in Kenya was that a civil case touching on the same issue was to be stayed pending the conclusion or result of the criminal case. See Khushi Mohamed v Suleimani Haji

(1946-47) (parts 1 and 2) Vol. XX11 LRK 54. In view of this legislative intervention the decision in Khushi Mohamed v Suleimani Haji has been overruled and is no longer good law.

2. This legislative intervention raises a number of challenges among them, the making of determinations that might prejudice the pending criminal trial. It may also force the courts concerned to share the exhibits, if any, which are essential to the determination of the issues raised in both courts.

3. Furthermore, I find that the petitioners/applicants are seeking a stay of this court's proceedings including the delivery of its judgement on the basis that the objector is facing criminal charges of giving false information and not forgery charges as submitted by counsel for the petitioners. Those charges are in relation to the birth and death certificates which are also relevant to the succession cause in this court. I find that those are allegations which are subject to prove beyond reasonable doubt. Those allegations cannot be a substitute for evidence. Those criminal proceedings might end up in a conviction, acquittal or being withdrawn altogether. The outcome of those proceedings is not relevant to the succession cause proceedings as the objector is not claiming the beneficial interest in the estate of the deceased. It is only her daughter who is claiming beneficial interests in the estate of the deceased.

4. In addition to the foregoing, the objector is presumed innocent until she is proved to be guilty in terms of article 50 (2) (a) of the 2010 Constitution of Kenya.

5. Furthermore, I find that the petitioners/applicants who are the brothers of the deceased are not claiming any beneficial interest in the estate of their deceased brother. I also find that they are not creditors to the estate of the deceased.

6. Finally, I find that they are only keen in attempting to enforce the criminal law whose outcome is irrelevant to the instant succession cause.

7. In the circumstances, I find that there is no basis for this to issue an order staying its proceedings, including an order of stay of the delivery of its judgement in the succession cause.

Issue 2

8. The petitioners/applicants are also seeking an order to set aside the ex parte proceedings herein and the hearing and determination of the objection proceedings to start afresh (de novo). In this regard, the record of the proceedings shows that on 26/02/2021 this court set down the cause for mention on 9/2/2021 for directions in respect of disposal of the cause. I directed Ms Nyongesa advocates for the objector to serve a notice of mention the petitioners/applicants. The petitioners/applicants were duly served with the notice of mention a matter in respect of which an affidavit of service dated 11/03/2021 was filed in court by the objector's advocates.

9. Since I was satisfied that the petitioners/applicants were served, I proceeded to fix the cause for hearing on 24/3/2021.

10. On 24/3/2021 the objector testified orally before me and closed her case in the absence of the petitioners/applicants.

11. Thereafter counsel for the objector applied and was allowed to file submissions within 10 days. On 27/4/2021 counsel for the objector appeared before me and confirmed that she had filed her submissions. It is on 27/4/2021 that counsel for the petitioners/applicants (Messrs Oumo) appeared in court and applied to regularize his appointment as such counsel. In the interim period I had set down the cause for judgement on 25/5/2021; which I stayed pending the hearing and determination of the instant application.

12. It is therefore clear that the petitioners/applicants deliberately chose not to participate in the hearing of the objection proceedings only to turn up and make a belated attempt to do so after I had set down the cause for judgement.

13. It is also clear from the supporting affidavit of the petitioners/applicants that they have not explained as to why they failed to attend court on 24/3/2021. Additionally, they have also failed to show whether they have any beneficial interest in the estate of their deceased brother that may have persuaded the court to exercise its discretion in granting them the opportunity to allow them to participate in the objection proceedings.

14. In the circumstances, I find as persuasive the observation of the authors in Halsbury's Laws of England, 4th edition, vol. 37 page 330 and 332, in which the authors observed that the power to stay proceedings ought to be exercised sparingly and only in exceptional case.

15. I therefore find that the petitioners/applicants are delaying the confirmation proceedings to the extent of obstructing the sole beneficiary who is now an adult from inheriting what is rightly due to her in respect of her deceased father's estate.

16. In the premises, the petitioners/applicants' application fails and is hereby dismissed in its entirety.

17. This court will now proceed to deliver the judgement that was sought to be stayed or set aside.

Ruling signed, dated and delivered in open court at Kabarnet this 11th day of **November 2021**.

J M BWONWONG'A

JUDGE

In the presence of

1. Ms Nyongesa for the Objector
2. Mr. Ouma for the petitioners