



REPUBLIC OF KENYA



**Rono & 4 others v Kirui (Civil Application E036 of 2023)  
[2023] KECA 1543 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1543 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E036 OF 2023  
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**CAROLINE CHEPNGETICH RONO ..... 1<sup>ST</sup> APPLICANT  
ELIZABETH CHELANGAT MILGO ..... 2<sup>ND</sup> APPLICANT  
REBECCA CHEPKOECH KOSKEI ..... 3<sup>RD</sup> APPLICANT  
ESTHER CHEBET KORIR ..... 4<sup>TH</sup> APPLICANT  
ALICE CHERONO ..... 5<sup>TH</sup> APPLICANT**

**AND**

**DANIEL KIPKORIR KIRUI ..... RESPONDENT**

*(An application for Injunction /Conservatory Orders restraining the implementation, alienation and/ or dealing with L.R. No. S Kericho/Segemik/ 679 & 707 respectively, pending the hearing and determination of the intended Appeal from the Ruling and/ or Order of the High Court at Kericho (A. Ongeru J.) dated 11th November 2022 in Kericho Succession Cause No. 230 of 2014)*

**RULING**

1. Caroline Chepngetich Rono, Elizabeth Chelangat Milgo, Rebecca Chepkoech Koskei, Esther Chebet Korir and Alice Cheron, the Applicants herein, are seeking orders of injunction and/ or conservatory orders pending the hearing and determination of their appeal. The said orders seek to restrain the implementation of the scheme of distribution contained in the certificate of grant issued on 22<sup>nd</sup> June 2016 where the said Applicants were excluded as beneficiaries of LR No. Kericho/ Segemik/ 679 and 707, and to restrain Daniel Kipkorir Kirui the Respondent herein, from alienating, subdividing, or selling LR. No. Kericho/ Segemik/679 & 707. In the alternative, the Applicants sought conservatory orders in respect of LR No. Kericho/ Segemik 670 and 707 with a view to preserving and /or otherwise conserving the status of the suit properties, pending hearing and determination of the intended appeal.



2. These prayers are in the Applicants' Notice of Motion application dated 26<sup>th</sup> April 2023 which was supported by an affidavit sworn on even date by Caroline Chepngetich Rono, the 1<sup>st</sup> Applicant. The Applicants averred that the High Court delivered a ruling on 11<sup>th</sup> November 2022 which dismissed their summons for revocation of grant for lacking merit and being *res judicata*, and being aggrieved they lodged their Notice of Appeal dated 14<sup>th</sup> November 2022 on 22<sup>nd</sup> November 2022 and prepared a draft Memorandum of appeal which they annexed. Furthermore, that the Respondent has since instructed the County Land Registrar and the County Surveyor, Bomet County to implement the scheme of distribution contained in the Certificate of Confirmation of Grant issued on 22<sup>nd</sup> June 2016 where the Applicants were excluded as beneficiaries of their deceased's father estate, and no shares given to them with respect to LR No. Kericho Segemik/679 & 707 belonging to the deceased.
3. Lastly, that the Respondent has also since moved the High Court through Summons for execution of mutation and transfer instruments dated 20<sup>th</sup> January 2023, in which he is seeking to compel the beneficiaries of the estate of the deceased to avail their personal and /or support documents to facilitate the alienation, subdivision and consequential transfer and registration of the subdivisions in favour of the respective beneficiaries in accordance with the impugned Certificate of Confirmation of Grant, and the matter was fixed for hearing on 9<sup>th</sup> May 2023.
4. The Respondent opposed the application in a Replying Affidavit dated 2<sup>nd</sup> August 2023, in which he asserted that the deceased, Kipkorir Arap Birir, died intestate on 9<sup>th</sup> March 2009, and had two houses with the Applicants being from the 1<sup>st</sup> house while he, the Respondent was from the 2<sup>nd</sup> house. That upon the death of the deceased there was no consensus among the heirs as to the person to take out the Grant of Letters of Administration and as a result of this apathy, he was constrained to issue citation proceedings against Wilson Kipkemoi Korir, Simon Kibii Korir, David Kiprui Korir and Henry Kurgat, who were representatives of the 1<sup>st</sup> House from where the Applicants came from, and on 13<sup>th</sup> March 2015, the High Court issued him with the Grant of Letters of Administration following the lapse of the period to lodge an objections.
5. Thereafter, that one Wilson Kipkemoi Korir, one of the heirs from the first house, lodged an application for Summons for Revocation of the Grant and which he withdrew, and another of the Applicant's brothers, Simon Kibii Korir, thereupon lodged another Summons for Revocation of Grant issued alleging that the Respondent had not included all the beneficiaries especially the Applicants. That the said Summons for Revocation of Grant dated 10<sup>th</sup> July 2017, was heard, determined and dismissed on 31<sup>st</sup> May 2019. It was the Respondent's assertion that the Applicants lodged their Summons for Revocation of the Grant dated 22<sup>nd</sup> September 2022 contending non-involvement and exclusion by the Respondent from administering the estate. He reiterated that the Applicants and the Objectors from the 1<sup>st</sup> House had always been duly aware of the probate proceedings before the High Court as per the Ruling dated 31<sup>st</sup> May 2019. Additionally, the ruling of 31<sup>st</sup> May 2019 was neither appealed against nor reviewed, and the Court opined in the ruling dated 11<sup>th</sup> November 2022 that the same was *res Judicata*.
6. We heard the application on 9<sup>th</sup> October 2023 on the Court's virtual platform. Learned counsel Ms. Bella Opondo appeared for the Applicants, while learned counsel Mr. Mulisa, appeared for the Respondent, and the two counsels highlighted their respective submissions dated 12<sup>th</sup> May 2023 and 2<sup>nd</sup> October 2023. The applicable principles in the exercise of this Court's unfettered discretion under Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022 to grant orders of injunction pending appeal or conservatory orders are well stated. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to additionally demonstrate that unless an order of stay is granted,



- the appeal or intended appeal will be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
7. It is essential to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. The Applicants contend that the proceedings offended the mandatory provisions of Article 27 of the *Constitution* of Kenya, in so far as the Applicants were disinherited and deprived of their lawful entitlement and share of the net intestate estate of the deceased. Ms. Opondo, counsel for the Applicants, cited the decisions in *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR, *National Bank of Kenya Ltd & 2 Others v Sam-Con Ltd* [2003] eKLR and *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) on the applicable principles for granting a stay of execution, injunction or stay of proceedings pending appeal.
  8. The counsel submitted that the intended appeal raised serious arguable points of law that this Court ought to afford opportunity to be ventilated on merit, and reiterated that the net result of the determination of the High Court was that the Applicants, who were daughters of the deceased, had been disinherited and denied benefit from the estate of their late father, and discriminated as against all the sons who shared in the net intestate estate. Further, that the Applicants were never a party to the initial objection decided by the High Court, and were sent away when they ultimately approached the said Court on the ground that their claim had been addressed, which was not the case. Ms. Opondo submitted that it was trite law that women or daughters were equally entitled to partake in the distribution of the estate of their deceased parents, and the Applicants were unjustly excluded from benefiting from the estate of their late father without lawful justification.
  9. The Respondent on the other hand contends that the intended application is an appeal under disguise being fronted by the objectors in the High Court, and Applicants were being used by the said objectors as conduits to overturn the orders issued by the said Court and derail the administration and account rendering of their late father's estate. The Respondent argued that the draft memorandum of appeal attached by the Applicants did not disclose the existence of an arguable appeal, was frivolous and vexatious, and merely calculated to delay the realization of his administration of the estate and rendition of the accounts. Mr. Mulisa, the Respondent's counsel, submitted that the principle of res judicata applied to probate matters, while relying on Rule 63 of the *Probate and Administration Rules* and the decision in the case of *Josephine Wambui Nyoike vs Margaret Wanjira Kamau & Another* [2013] eKLR. Reliance was also placed on the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasile & Another*, Nairobi CACA No. 238 of 2005, for the position that the Applicants are required to point out to the Court the grounds which they believe are arguable which they had not done.
  10. The Applicants have in this respect availed a draft memorandum of appeal in which they raised eight (8) grounds of appeal on which they are of the view the High Court erred, and which revolve around two issues. The first is whether the High Court erred in its finding that the Applicant's application was res judicata, and secondly whether the High Court's findings were illegal and discriminatory. We are of the view that these are not frivolous issues, and that they are issues which require further consideration by this Court in the circumstances of the intended appeal. We therefore find that the Applicants have an arguable appeal.
  11. On the nugatory aspect, it was held in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* (supra) that whether or not an appeal will be rendered nugatory depends on whether or not what ought to be stayed or injuncted, if allowed to happen is reversible; or if not reversible whether damages will reasonably compensate the party aggrieved. We also refer to the observations made in *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 that factors which render an appeal nugatory



are to be considered within the circumstances of each case and in so doing the Court is bound to consider the conflicting claims of both sides.

12. The Applicants in this respect urge that in the event that the intended alienation, subdivision and consequential transfers and registration of the resultant subdivisions is actualized, the Applicants shall suffer substantial and irreparable loss as they will be disinherited. Additionally, the implementation and execution of the scheme of distribution contained in the certificate of confirmation issued on 22<sup>nd</sup> June 2016, will render the appeal otiose and reduce the same to a mere academic exercise and thus nugatory. It is the Applicants' assertion that this Court has power and inherent jurisdiction to preserve and protect the subject matter of the appeal and that the Respondent shall not suffer injury if the prayers sought are granted. Ms. Opondo submitted that the County Land Registrar had already visited the suit parcels herein being LR NO. Kericho/ Segemik/ 679 & 707 and caused the same to be surveyed, and was now intending to have the requisite consent of the land control be obtained upon mutations being drawn with a view to effect registration as per the impugned certificate of confirmation of grant.
13. The Respondent on his part deponed that the Applicants failed to supply evidence of substantial loss and to the contrary, it is the deceased's estate that will be exposed to suffer undue prejudice if an order of stay was made. Further, that the substratum of the appeal would not be rendered nugatory as the Applicants are only required to provide support documents to enable transfer and registration of their due shares as the 1<sup>st</sup> house. Mr. Mulisa, while reiterating these averments, cited the decision in the cases of *Governors Ballon Safaris Ltd v Skyship Company Ltd & Another* Nairobi CACA No. 32 of 2015, and *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* Nairobi CACA No. 97 of 1986 that the onus to demonstrate that the appeal will be rendered nugatory and to establish the loss and prejudice they would suffer fell squarely on the applicants, which they had not done.
14. It is not disputed that the effect of the scheme of distribution contained in the Certificate of Confirmation of Grant issued on 22<sup>nd</sup> June 2016 is that the Applicants will be excluded in the inheritance of their deceased's father's properties in LR No. Kericho/ Segemik/ 679 and 707. It is our view this is adequate demonstration of the prejudice the Applicants will suffer if the orders sought are not granted. There is also no indication that this situation can be reversible, and if so, how the Applicants can be compensated in the event their appeal was to succeed. It is therefore in the interests of justice for all affected that the subject matter of the appeal is preserved pending the hearing and determination of the appeal. To this extent, we find that the Applicants have satisfied the second requirement for the grant of the orders of injunction sought.
15. In conclusion we find merit in the Applicants' Notice of Motion application dated 26<sup>th</sup> April 2023, and accordingly grant the following orders:
  - I. Daniel Kipkorir Kirui, the Respondent herein, be and is hereby restrained from implementing or in any other manner executing the scheme of distribution contained in the Certificate of Confirmation of Grant issued on 22<sup>nd</sup> June 2016 in Kericho H.C. Succession Cause No. 230 of 2014, pending the hearing and determination of the Applicants' intended appeal.
  - II. Daniel Kipkorir Kirui the Respondent herein, be and is hereby restrained from alienating, subdividing, selling, or in any other manner disposing of LR. No. Kericho/ Segemik/679 and LR. No. Kericho/ Segemik/707 pending the hearing and determination of the Applicant's intended appeal.
  - III. As this is a family dispute, each party shall bear their respective costs of the Notice of Motion application dated 26<sup>th</sup> April 2023.
16. It is so ordered.



DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

