



REPUBLIC OF KENYA



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**In re Estate of the Late Kiplagat Arap Cheboi (Succession Cause  
261 of 2015) [2024] KEHC 1625 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1625 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 261 OF 2015  
JRA WANANDA, J  
FEBRUARY 23, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPLAGAT ARAP CHEBOI**

**BETWEEN**

**BETSY JEPCHIRCHIR ..... 1<sup>ST</sup> PETITIONER**

**TITUS KIMUTAI KIPLAGAT ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PAULINE KIPLAGAT ..... APPLICANT**

**RULING**

1. The deceased, Kiplagat Arap Cheboi died on 11/04/2013. During his lifetime he married 3 wives including the 3<sup>rd</sup> Petitioner who was the 2<sup>nd</sup> wife (2<sup>nd</sup> House). On 8/07/2015 the 2<sup>nd</sup> Petitioner (from the 3<sup>rd</sup> House) and one Mark Kibet Kiplagat (from the 1<sup>st</sup> House) applied for Grant of Letters of Administration in respect of the estate in their capacities as sons of the deceased.
2. Before the Grant could be issued, the said Mark Kibet Kiplagat died. Further, the 3<sup>rd</sup> Petitioner filed an Objection challenging her omission as a co-Petitioner. Fortunately, by the consent orders adopted on 28/09/2018 before Hon. Justice H. Omondi (as she then was), these matters were resolved when the present 1<sup>st</sup> Petitioner, Betsy Jepchirchir was substituted in place of the late Mark Kibet Kiplagat as co-Petitioner and the 3<sup>rd</sup> Petitioner was also allowed to join as a co-Petitioner. Accordingly, the Grant was then issued in the names the 3 – Titus Kimutai Kiplagat, Betsy Jepchirchir and Pauline Kibet - as joint Administrators on 28/09/2018.
3. The Record then shows that on 30/03/2020, a further consent was recorded before Omondi J in which the Grant was confirmed. The only immovable properly declared was parcel number Uasin Gishu/ Kimumu/379 measuring 9.6 Ha and which was agreed to be shared equally between the 3 houses, the deceased's employment benefits from Kenya Police Sacco and Kenya Posta were also to be shared



- equally. Further, House A and House C were to reimburse House B its share of payment was paid to “clear land debts”.
4. The Application now before the Court is the 3<sup>rd</sup> Petitioner’s Notice of Motion dated 23/03/2022 seeking the following orders:
    - i. [.....] Spent
    - ii. That the Honourable Court be pleased to stay this Cause to await the outcome of the pending Eldoret CMCC Succession Cause No. 41 of 2019 where the deceased herein is a beneficiary/dependent with known shares/properties.
    - iii. That costs of the application be in the Cause.
  5. The Application is filed through Messrs Rioba Omboto & Co. Advocates and is brought under Section 16, 63 and 73 of the *Probate and Administration Rules*, Order 40 of the *Civil Procedure Rule* 2010, Section 3A of the *Civil Procedure Act* and “all other enabling provisions of the law”. It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 3<sup>rd</sup> Petitioner, Pauline Kiplagat.
  6. In the Affidavit, the 3<sup>rd</sup> Petitioner has deponed that the Respondents (his co-Petitioners) when filing this Cause, never disclosed the properties inherited by the deceased herein from his late father Cheboi Chemitei Moigut, that the deceased herein who was her husband was a son of the late Cheboi Chemitei Moigut (thus 3<sup>rd</sup> Petitioner’s father-in-law), that the father-in-law died intestate and left two survivors - the deceased herein and one Vincent Kipkorir Cheboi - that the father-in-law had several properties which were inherited by the deceased herein, that the Respondents and other siblings occupy or utilize those properties to date however they never disclosed the same to the Court while Petitioning this Court, that the distribution of the properties is ongoing in Eldoret CMC P&A No. 41 of 2019 where the Respondents and their siblings are beneficiaries, that it is in the interest of justice to stay this Cause so as to give all the beneficiaries a fair and just distribution to the father-in-law’s estate taking into account those beneficiaries that have already benefited from the father-in-law’s (grandfather) estate

### **Respondent’s Replying Affidavit**

7. In opposing the Application, the Respondents relied on the Replying Affidavit sworn by the 2<sup>nd</sup> Petitioner, Titus Kimutai Kiplagat and filed on 17/05/2022 through Messrs Ledisha J.K. Kittony & Co. Advocates. In the Affidavit, the 2<sup>nd</sup> Petitioner deponed that this matter was already concluded when on 27/01/2020 a consent was recorded on distribution which identified the shares for each of the 3 houses and also directed that the Grant be confirmed, that the consent was reached upon the 3<sup>rd</sup> Petitioner’s Objection and all issues raised were fully addressed, that when the Respondents attempted to have the order executed the 3<sup>rd</sup> Petitioner became adamant and totally refused to co-operate, that they sent several requests for a meeting to agree on when the Surveyor could attend for purposes of survey and subdivision and the costs thereof but the 3<sup>rd</sup> Petitioner persistently ignored all the requests, that the Respondents finally decided to get a Surveyor who merely confirmed the boundaries and marked the same with poles leaving the 3<sup>rd</sup> Petitioner’s portion untouched, that the Respondents ploughed and planted on their portion only for the 3<sup>rd</sup> Petitioner to destroy the crops, that the 3<sup>rd</sup> Petitioner’s Lawyers claimed that the Grant had not been confirmed and then filed an Application dated 8/04/2020 seeking that a Surveyor be appointed to subdivide the parcel into 3 portions, that this was notwithstanding that the Respondents had already engaged a Surveyor to conduct such demarcation, that to date the 3<sup>rd</sup> Petitioner has not made any effort to abide by the Court order but instead has been buying time as



she continues to enjoy the stay, and that the instant Application is in furtherance of the 3<sup>rd</sup> Petitioner's gimmicks.

8. Regarding Eldoret CM Succession (P&A No. 41 of 2019, the 2<sup>nd</sup> Respondent deponed that the Petitioner therein filed the same secretly and did not inform any of them, that in any case the issue of the relationship between the two estates was raised before Hon. Justice H. Omondi on 27/01/2020 and the Judge correctly ruled that the 2 estates were independent and should proceed as such, and that the Court also observed that there was an intentional delaying tactic on the part of the 3<sup>rd</sup> Petitioner.
9. The 3<sup>rd</sup> Respondent added that an attempted Mediation failed due to the 3<sup>rd</sup> Petitioner's malice and the matter referred back to the Court on 21/01/2022, that it is expected that the Court will now order for execution of the Court order pursuant to the consent order and allow the Respondents' own pending Application dated 8/04/2020, that the prayers sought by the 3<sup>rd</sup> Petitioner cannot issue since the present Cause was filed over 4 years before filing of the Petition in CM Succession (P&A) No. 41 of 2019, that the grandfather's assets in CM Succession (P&A) No. 41 of 2019 if shared fairly shall entitle a share of the same to their father (the deceased herein) and which shall in turn be shared equally among the 3 houses and that the claims of prejudice and disentitlement to the 3<sup>rd</sup> Petitioner's house is merely an imagination by the 3<sup>rd</sup> Petitioner intended to mislead the Court.

### Hearing of the Application

10. The Application was canvassed by way of written Submissions. Pursuant to directions given, the 3<sup>rd</sup> Petitioner's Counsel filed his Submissions on 2/09/2022 while the Respondents' Counsel filed on 22/09/2023.
11. I notice that together with the Submissions, the Respondents' Counsel also "sneaked in" an Affidavit without leave of the Court. I will comment on this Affidavit later.

### 3<sup>rd</sup> Petitioner's Submissions

12. In his Submissions, Counsel for the 3<sup>rd</sup> Petitioner observed that the Respondents have confirmed that the existence of CM Succession (P&A) No. 41 of 2019 was not disclosed to the Court at the time of filing of this Cause, that stay of this Cause will confer justice to all beneficiaries since what will be awarded to the estate herein from CM Succession (P&A) No. 41 of 2019 shall be listed here for purposes of equal distribution without having the properties so bequeathed passing through the hands of another party and thereafter instituting a miscellaneous Succession Cause, that the Court has inherent powers under Section 3A of the Civil Procedure Act to stay proceedings to ensure justice is done to parties and under Article 159 of the *Constitution* to ensure justice without undue regard to technicalities. He cited the case of *Kenya Power & Lighting Co. Limited v Esther Wanjiru Wokeebi*, Civil Appeal No. 326 of 2013 [2014] eKLR on the criteria for consideration for an order of stay of proceedings, and also the case of *Global Tours & Travel Limited*, Nairobi HC Winding Up Cause No. 43 of 2000 and also the case of *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd* [2015] eKLR.
13. Counsel submitted further that if this Cause is not stayed then the parties shall be back before this Court over the same subject matter hence the need to have the properties consolidated from the two estates, that the issues raised are weighty and if the Court fails to give the 3<sup>rd</sup> Petitioner an opportunity to raise the same then the parties are likely to come back, that the right to be heard cannot be limited as provided under Article 25 and 51 of the *Constitution*, that CM Succession (P&A) No. 41 of 2019 is at an advanced stage and the Respondents being the eldest persons within the family can fast-track it, that if this Court fails to stay these proceedings then CM Succession (P&A) No. 41 of 2019 shall



be concluded and the estate herein shall be denied its rightful share, and that the Respondents are colluding to hide some crucial information relating to the additional properties.

14. The 3<sup>rd</sup> Petitioner's Counsel has then unprocedurally proceeded to introduce fresh factual matters that are not contained in his client's Supporting Affidavit. I am sure Counsel is well aware that factual matters cannot be introduced at Submissions stage and was only "trying his luck" with this Court. Accordingly, I decline to entertain or consider such new matters.

### **Respondent's Submissions**

15. On her part, Counsel for the Respondents submitted that her clients filed an Application in Eldoret CMCC Succession P&A No. 41 of 2019 seeking revocation of the Grant issued therein, that the ground advanced was that the Grant was obtained unprocedurally, and that by its Ruling delivered on 8/08/2023 the Court allowed the Application and revoked the Grant. According to Counsel therefore, the instant Application has no merits since the two matters relate to different estates.
16. Again, it is evident that these are new facts being unprocedurally raised at the belated stage of Submissions. I appreciate that the above are matters that could have arisen subsequent to the directions already given herein. However, had then Respondents wished to formally bring up the same to this Court's attention, nothing would have been difficult than to seek the Court's leave to file a proper Supplementary Affidavit. Instead, Counsel has "sneaked in" a fresh Affidavit without the Court's leave and then urged the Court to call for the lower Court file and peruse the file and verify the matters by itself. I respectfully decline this invitation since I do not believe that it is the Court's duty to do for parties their work. Secondly, I do not have any information on whether the 3<sup>rd</sup> Petitioner's Advocates were even served with the Affidavit to enable them respond.

### **Analysis & Determination**

17. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the one broad issue that arises for determination in this matter to be

"whether the 3<sup>rd</sup> Petitioner has established a case for stay of these proceedings pending determination of Eldoret Chief Magistrates Succession (P&A) No. 41 of 2019".
18. 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 in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000, although he was dealing with an application for stay of proceedings pending Appeal, made the following remarks that are equally relevant to this matter:

"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.”

19. The requirement for the Court to judiciously exercise its discretion when considering an Application to stay proceedings was reiterated by 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...”

20. Similarly, *Halsbury’s Law of England*, 4<sup>th</sup> 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.”

21. Further, in *Kenya Wildlife Services v Jane Mutembi* [2019] eKLR, again, F. Gikonyo J 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.”

22. 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.

23. In this matter, the 3<sup>rd</sup> Petitioner argues that it has now emerged that there is an ongoing separate Succession Cause over the estate of the father of the deceased herein and in which estate the deceased, being a son, would be entitled to some further property which would then also be subject to distribution in this Cause. The 3<sup>rd</sup> Petitioner therefore beseeches this Court to “hold its horses” until distribution of property in that other estate is concluded. On the face of it, this sounds like an attractive argument since it advances the acceptable logic that distribution of the property owned or to be owned



by the deceased herein should not be conducted until all property belonging or to belong to him has been fully identified and collected. Is that however so?

24. Applying the principles set out in the various authorities to this matter, as I had already stated, the Record shows that on 28/09/2020, the parties' Counsels recorded a consent before Omondi J in which the Grant of Letters of Administration was indicated as confirmed. Under the consent, the only immovable properly declared was parcel number Uasin Gishu/Kimumu/379 and which was agreed to be shared equally between the 3 houses, the deceased's employment benefits from Kenya Police Sacco and Kenya Posta were also to be shared equally and further, House A and House C were to reimburse House B its share of payment was paid to "clear land debts".
25. It is evident that it is along the said lines that in opposing the present Application, the Respondents through the Replying Affidavit sworn by the 2<sup>nd</sup> Petitioner, Titus Kimutai Kiplagat argued that this Cause was already concluded when a consent was recorded on distribution which identified the shares for each of the 3 houses and also directed that the Grant be confirmed. It was further stated in the Affidavit that the consent was reached upon the 3<sup>rd</sup> Petitioner's Application for Objection and all issues raised were fully addressed.
26. Upon perusal of the record, I tend to agree with the Respondents. The consent orders of 28/09/2020 were adopted as a result of the Objection filed by the 3<sup>rd</sup> Petitioner and the orders were recorded in the presence of the Advocates for both parties. The orders have not been sought to be set aside and are lawfully in place and binding upon the parties. By seeking to stay these proceedings, the 3<sup>rd</sup> Petitioner is attempting to achieve a Review of the consent orders of 28/09/2020 through the "back door".
27. It may well be true that the 3<sup>rd</sup> Petitioner only learnt of the existence of Eldoret Chief Magistrate Succession (P&A) Cause No. 41 of 2019 subsequent to the consent orders of 28/09/2020. However, the proper procedure would have been for her to apply for Review of the orders on the grounds of discovery of the said Succession Cause as new and important information or evidence. The Court would then interrogate such Application and if satisfied, make appropriate orders.
28. In any event, it has not been demonstrated to the satisfaction of this Court that the 3<sup>rd</sup> Petitioner would be irreparably prejudiced if the distribution of property in this Cause were to be concluded before similar distribution is carried out in the lower Court Succession Cause. Even if distribution of property in this Cause were to be concluded and subsequently new or additional property is awarded to the estate herein from the lower Court Cause, the door would still be open for any party to apply for re-opening of this Cause to facilitate inclusion and distribution of such new property. The Court is competent enough to deal with such eventuality if and when it arises. For now, no sufficient grounds have been presented as to why the consent orders recorded on 28/09/2020 should not be implemented or executed or held in abeyance. The mere existence of Eldoret Chief Magistrate Succession (P&A) Cause No. 41 of 2019 and even the possibility that additional property may be forthcoming from that Cause are not sufficient grounds to stay these proceedings.
29. Whether or not any additional property will eventually be added to the estate herein from the estate of the deceased's father is for now purely a matter of speculation. If and when such possibility crystallizes, the Law of Succession Act has sufficient provisions to guide on how such new property shall be handled. Having been filed in the year 2015, 9 years ago, granting stay of proceedings will only further delay the conclusion of this Cause and only add to the acrimony that is already evident among the family members.
30. It is also clear that the pendency of this Cause is being mischievously used by some of the family members to frustrate and hold others at ransom and to play "mind games" with each other to the



prejudice of the estate. Elongating litigation by granting stay of proceedings will only give such parties a forum to perpetuate these mind games. This the Court will not allow.

31. In recognition of the principle that the discretion to order stay of proceedings ought to be exercised sparingly, and only in exceptional cases, I find that this is not such exceptional case.

**Final Orders**

32. In the end, I make the following orders:

- i. The 3<sup>rd</sup> Petitioner's Notice of Motion dated 23/03/2022 is hereby dismissed.
- ii. This being a family matter, I make no order on costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

