



REPUBLIC OF KENYA



In re Estate of Kipkosget Arap Chesoen (Deceased) (Succession Cause 141 of 2008) [2024] KEHC 4070 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 141 OF 2008
RN NYAKUNDI, J
APRIL 25, 2024**

IN THE MATTER OF THE ESTATE OF KIPKOSGET ARAP CHESOEN (DECEASED)

BETWEEN

ALFRED KIBIY SUGE PETITIONER

AND

RODAH CHEPTOO LELEI OBJECTOR

RULING

1. The applicant approached this court *vide* a Notice of Motion dated 15th May 2023 seeking the following orders
 1. Spent
 2. That this honourable court be pleased to vacate the orders issued on 17th June 2022 for being inconsistent with record of the court proceedings of 13th June 2022 and the orders that were actually given
 3. Costs be provided
2. The application is premised on the contents set out therein and the averments in the supporting affidavit sworn by Alfred Kibiy Suge

Applicant's case

3. The applicant contends that the court delivered a ruling on 21st March 2022 on distribution of the estate of the deceased and the certificate of confirmation of grant were issued on March 2023. Further, that the respondent filed a notice of appeal on 8th April 2022 and an application for stay of execution. On 13th June 2022 the application came up for hearing and Hon. Justice E.K Ogola issued orders allowing stay of execution. On 17th June, an order was issued which the applicant contends was at



variance with the proceedings of 13th June 2022. The applicants' case is that the error was not detected by the deputy registrar who signed it and therefore it is necessary for the orders to be vacated so as to correct the error that was committed in the issuance of the orders.

4. He urged that the orders are prejudicial to the beneficiaries as it delays the subject of the sub division and it is fair just and expedient that the application be allowed.

Respondent's case

5. The respondent opposed the application *vide* a replying affidavit dated 30th May 2023. She averred that the application is incompetent and devoid of merit. She stated that the court delivered its ruling on distribution on 21st March 2023 and consequently, she instructed her advocate to apply for stay of execution and institute an appeal. Further, that upon her application dated 14th April 2022 being heard on 13th June 2022 she was granted stay of execution. Her advocates extracted orders on 17th June 2022 which were consistent with the proceedings of 13th June 2022. She prayed that the application be dismissed with costs.

Analysis & Determination

1. Whether the court can entertain the present application
2. Whether the orders issued on 17th June 2022 are inconsistent with the court proceedings of 13th June 2022

Whether the court can entertain the present application

6. The answer is in the affirmative based on the strength of Section 80 of the [CPA](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). The court exercises jurisdiction on review on the following legal threshold having been met by the Applicant.
 - a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or
 - b. On account of some mistake or error apparent on the face of the record
 - c. For any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.
7. In the case of *Batuk K Vyas vs Surat Municipality* AIR (1993) Born 133 thus: " No error can be said to be apparent on the face the record if it is not manifest or self-evident and requires an examination or arguments to establish it....."
8. In [Republic v Public Procurement Administrative Review Board & 2 Others](#) (2018) eKLR it was held that: The jurisdiction under Section 80 and Order 45 provisions restrict the grounds for review of any judgement or ruling of the court. The test is on the correct interpretation of what constitutes discovery of new important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant and could not be produced by him or her at the time of the decree subject matter of review. There is also grounds on account of mistake, error apparent on the face of the record. In [Wangechi Kimata & Another Vs Charan Singh](#) (C.A No 80 of 1985 the court of Appeal had this to say. " Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section



80 of the Civil Procedure Act, and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.

9. The analogy to be drawn from the above principles the scope of the jurisdiction to be exercised by this court is crystal clear.
10. The applicant seeks to have the court vacate its orders issued on 17th June 2022 as they are inconsistent with the record of the court proceedings of 13th June 2022. The record of the court proceedings on the said date allowed the prayers for stay of execution in terms of prayer 2 in the application dated 14th April 2022. Prayer 2 of the application stated as follows; The truth of the matter is that on the 23.5.2022 the session judge Ogola J. in the presence of Magut for the petitioner and M/s Ngala for the Applicant / protester.
11. In a Status Conference held in the presence of two legal counsels the session judge made the following directions: That the application dated 14.4.2022 will be heard on 13.6. 2022. Pursuant to that order, proceedings for 13.6.2022 were held before the same session judge and in the presence of M/s Ngala for the Applicant. It dawned on the court that legal counsel Mr. Magut was yet to file a replying affidavit to the application by Legal Counsel M/s Ngala dated. 14.4.2022. Legal counsel Mr. Magut could not be reached. Notwithstanding non attendance of counsel for the respondent this order was generated: Mr. magut is not in court and there is explanation of his whereabouts. I allow stay of execution in terms of prayer No. 2o of the application dated 14.4.2022 pending inter-parties hearing of the application. Parties to file submissions to the Application. Hearing on 24.10. 2022. On the due date scheduled no proceedings were held before the session judge. The matter was rescheduled to the 6.3.2023 before the session judge Wananda J who also decreed as follows: I note that interim orders were issued on 13.6.2022 by Hon. Justice Ogola pending the applicant's Appeal. I direct that this matter be mentioned on 19.6.2023 for further directions and the court be upraised on the progress of the Appeal. This is in so far as the record presents itself.
12. Briefly the application dated 14.4.2022 by leaned counsel M/s Ngala which was expressed to be brought under Section 37 of the Law of Succession Act and Rule 73(1) of the Probate and Administration rules seeking and order of stay of execution and implementation of the ruling dated 21.3.2022 has never been heard on the merits by the session Judge Ogolla J. What the Judge pronounced himself about as depicted by the record was for learned counsel Mr. Magut to file a replying affidavit and submission from both parties to enable him determine the application. What was issued was issued on the material day and as supported by the record is the order for the application to heard inter-parties but in the interim stay of execution was issued. The other prayer in that Notice of Motion was to be granted to the protestors/Applicant to file an Appeal to the Court of Appeal against the ruling dated 21.3.2022. It is not lost for this court that the impression created by the parties that an order of this court exist on stay of execution pending the determination of an Appeal before the court of Appeal is an erroneous facts. The 2nd aspect of this conversation no leave has ever been granted as it is the statutory framework to file an Appeal to the court of Appeal against the ruling dated 21.3.2022. First things first any Applicant riding on Interim Orders to forestall any proceedings in this probate cause is in breach of order 40 Rule 4(2) of the Civil Procedure Rules which dictates as follows: An *ex-parte* injunction may be granted only once for not more than 14 days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding 14 days. All applications under this order shall be heard expeditiously and in any event within 60 days from the date of filing unless the court in good reasons extends the time.
13. The application of 14.4.2022 if ever interim orders were extracted to read stay of execution pending the outcome of an Appeal is a mistake and an error on the face of the record. There are no rights of injunction which accrued in favour of the respondent. The Applicant also may be in violation of the



law for misleading the opponents to the dispute that an appeal exist before the court of Appeal. I find that to be an abuse of the court process. This also tramples on the rights of the winning party who has a judgement of the court in his or her favour capable of being executed unless reviewed by this court under Section 80 of the *Civil Procedure Act* or Order 45 (i) of the *Civil Procedure Rules*. The pertinent question is whether this court can exercise jurisdiction on errors of law and facts on the face of the record. The answer is found in Section 80 of the *CPA* and Order 45 (i) of the *Civil Procedure Rules*. Though it is simple enough for a party to say he or she has an order of the court when there is considerable obscurity surrounding the question of what constitutes a correct or legal order of the court, it is prudent that any reliance be placed on the true record of that trial court. There seems to be compelling evidence why the application on review of the erroneous order on account of mistake and error of fact and law to vary it and have it set aside to reflect the true and proper findings by the session judge Ogola J. The arguments being advanced by the respondent are interesting to the level that no leave to pursue an appeal to the court of appeal from the decision of this court has ever been granted. From the same discourse even from the affidavit the applicant is at pains to make reference to an existing substantive appeal before the Apex court on such matters. I am surprised that the respondent is unable to differentiate between interim orders issued pending the determination of and interlocutory application and final orders on stay of execution issued on the merits. It is curious when reading the affidavit evidence being relied upon by the respondent attaches no documentary evidence to satisfy the criteria of a decision of this court on issues determined on the merits.

14. In the first place there is no dispute that a remedy of setting aside the mistaken order of stay of execution of being an error apparent on face of the record is the finding I hold in favour of the applicant's Application. The consequences of it is that the Applicant as placed before court evidence of the mistaken findings of facts being relied upon while in the real sense there was no such an order of any significance to vindicate any rights to any of the parties before this court. The upshot of it and for those reasons discussed elsewhere in this ruling in terms of order 40 Rule 2, 3 & 4 of the *Civil Procedure Rules* interim orders have no life to be sustained by this court. Secondly on the vital consideration with respect to the substratum of the application before me it is clear that the orders so being invoked as having been issued by Ogola J all demonstrate an error of fact and law on the face of the record. The error is manifest on the face of the purported final order of stay of execution pending hearing and determination of a substantive of appeal while it is difficult even to infer existence of any Appeal in a superior court. Without much adverting to the theoretical basis and viewpoints being advanced by the respondent I rest my case in favour of the Applicant's remedy as pleaded in the motion of 14.4.2022 in the application dated 15. 5. 2023. The extracted orders by the respondent being waved around on stay of execution and existence of an Appeal against the ruling of this court dated 21.3. 2022 remain to be an abuse of the court process. As of now there is no justiciable issue to delay the transmission of the intestate estate of Kipsoget Arap Chesoen.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25 DAY OF APRIL 2024.

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R. NYAKUNDI

JUDGE

