

KENYA / JUDGMENT

Cheriro v Kimeto [2025] KEHC 10240 (KLR)

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COURT

High Court

BEFORE

JK Serгон

CASE / FILE NUMBER

Civil Appeal E073 of 2024

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Cheriro v Kimeto (Civil Appeal E073 of 2024) [2025] KEHC 10240 (KLR) (17 July 2025) (Ruling)

Neutral citation:

[2025] KEHC 10240 (KLR)

Republic of Kenya

In the High Court at Kericho

Civil Appeal E073 of 2024

JK Serгон, J

July 17, 2025

IN THE MATTER OF THE ESTATE OF PHILIP KIKWAI CHERIRO (DECEASED)

Between

Rusi Chepngetich Cheriro

Appellant

and

Augustine Kiprono Kimeto

Respondent

(Being an appeal against the Ruling delivered on 14th day of December, 2023 by F.M.NYAKUNDI in Kericho Chief Magistrate's Court, Succession Cause Number 142 of 2017)

Ruling

1. The application coming up for determination is a notice of motion dated 16th April, 2025 seeking the following orders;(i)Spent(ii)Spent(iii)That pending the hearing and determination of this Appeal, the Honourable court may be pleased to grant a temporary injunction restraining the Respondents from evicting, disposing, fencing, cultivating and/or dealing in anyway the estate land previously known as Kericho/Roret /204 and now subdivided into several resultant subdivisions namely Kericho/Roret/2298, Kericho/Roret/2299 and Kericho/Roret/2230 based on certificate of confirmation of grant dated 17th day of March 2023 and which is the subject matter of this Appeal.(iv)Spent(v)That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and an affidavit in support of the application sworn by Rusi Chepngetich Cheriro, the appellant/applicant herein.
3. She avers that the appeal is based on ruling of estate of the late Paul Kikwai Cheriro (Deceased) who was her husband and that being dissatisfied with the ruling of the lower court in Kericho Succession Cause No. 142 of 2017, filed the instant appeal, she attached a copy of the Memorandum of Appeal.
4. She avers that during the lifetime of the said deceased person, he acquired properties constituting his estate including the one she was residing with her children being Title Number Kericho/Roret/204 measuring 11. 5 Acres.
5. She avers that when the lower court delivered the said ruling, the respondent swiftly obtained a certificate of confirmation of grant and was issued with title deeds and asked them to vacate the said estate land. She further avers that in the circumstances, if status quo is not maintained before hearing and determination of this appeal, they shall incur irreparable damage and will be rendered homeless and further that the onus of this application and appeal shall be defeated.
6. She avers that there are high chances of success of the appeal and moreso, the respondent had concealed other estate lands and monies which was left undistributed.
7. She avers that if the orders being sought in this application are not granted, they shall be evicted, rendered destitute and will have no place of abode.
8. Augustine Kiprono Kimeto the respondent filed a preliminary objection premised on a point of law in response to the instant application on the following grounds;(i)That the application dated 16th April 2025 is fatally and incurably defective, bad in law, incompetent and misconceived for the following reasons: -(a)That the said application offends the provisions of Section 7 of the Civil Procedure Act for being Res Judicata since a similar application dated 3rd August 2024 before the lower Court in Kericho CMC ELC No. E074 of 2024 has been heard and determined and no Appeal has been preferred thereto.(b)That the application further offends the direct Provisions of Sections 6 of the Civil Procedure Act for being Sub-judice since all the matters in this application are actively, directly and substantially being

adjudicated before the Kericho CMC ELC No. E074 of 2024. (c) That entertaining this application where a similar application is being adjudicated and when all matters herein are also being adjudicated before the Chief Magistrates Court amounts to multiplicity of proceedings and suits which is a gross abuse of the Court process and impermissible. (ii) That this Honorable Court is deprived of the jurisdiction to determine the application herein in light of the Provisions of Article 162 of the Constitution of Kenya as read with Section 13 of the Environment and Land Court Act as the application herein primarily seeks reliefs related to the use, planning, evictions, transactions and titles of land that is not registered in the name of the deceased Estate. The property evolved a long time ago and therefore the Applicant's reliefs lie elsewhere and not this honourable court constituted as a Probate Court. (iii) The application herein is bad in law, lacks legal merit and a total unwarranted afterthought fatally defeated by operation of the doctrine of laches and delays; the Certificate of Confirmation of Grant in Kericho CMC Succession Cause No. 142 of 2017 having been issued way back in March 2023 and the same having been fully executed. Further to this, the Estate having been wholly and entirely subdivided and finally, a suit having been filed before the Chief Magistrates Court in line with the Land Registration Act to enforce the transmission of the parcels to their rightful beneficiaries; then the Applicant cannot file such an application as this, before the family & probate Court.

9. The application came up for inter partes hearing and the counsel for the respective parties made oral submissions. The learned counsel for the appellant/applicant reiterated that he would be relying on grounds set out on the notice of motion and supporting affidavit. He argued that the instant appeal is based on the ruling of the lower court under which the estate of the deceased was distributed irregularly and the respondents rushed to subdivide the estate property and obtain the resultant titles and a civil suit instituted to evict the deceased's widow and her children.
10. The learned counsel for the respondent argued that the orders sought in the instant application are similar to those sought in Kericho CMC ELC no. 74 of 2024 and given that there is a similar application pending in the above referenced court, the aggrieved party should pursue her right in the said trial court.
11. The learned counsel for the respondent argued that upon confirmation of grant the probate court becomes functus officio. The learned counsel for the appellant/applicant countered and reiterated that they have a right to an appeal and having appealed in this court, the issue of functus officio cannot arise.
12. I have considered the application, preliminary objection and oral submissions and find that the issue for determination whether to grant temporary injunction in respect to the estate land previously known as Kericho/Roret/204 and now subdivided into several resultant subdivisions namely Kericho/Roret/2298, Kericho/Roret/2299 and Kericho/Roret/2230 based on certificate of confirmation of grant dated 17th day of March 2023 and the whether the preliminary objection is merited.

13. On the issues as to whether to grant a temporary injunction in respect to the estate, section 47 of the law of succession Act vests in the court wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. The said section 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.” whereas rule 73 of the probate and administration rules provide 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 court process.”
14. A reading of these two sections indicates that the probate court is clothed with wide discretionary powers to do what is necessary to ensure that ends of justice are met. This position is buttressed in the decision of Millicent Mbatha Mulavu v Annah Ndunge Mulava & 3 others (2018) eKLR, where the probate court affirmed that it has powers to issue injunctive orders for purposes of preserving the estate of a deceased person. The above provisions notwithstanding, in the instant matter, the Certificate of Confirmation of Grant in Kericho CMC Succession Cause No. 142 of 2017 was issued in March 2023 and has been fully executed, the estate subdivided and resultant titles issued and a suit having been filed before the ELC Chief Magistrates Court vide Kericho CMC ELC No. 74 of 2024 in line with the Land Registration Act to enforce the transmission of the parcels to their rightful beneficiaries.
15. It is the finding of this court that the applicant should ventilate her grievances in Kericho CMC ELC No. 74 of 2024.
16. On the issue as to whether the preliminary objection is merited, the Respondent having filed suit against the Applicant before Environment and Land Court, can only carry out an eviction of the applicant through a due process and in those proceedings, not on the basis of the proceedings arising from the succession cause.
17. In view of the proceedings in Kericho CMC ELC No. 74 of 2024 any attempts to issue any orders would be tantamount to usurping the jurisdiction of the Environment and Land Court. It is therefore the finding of this court that the preliminary objection is merited.
18. Consequently, the preliminary objection is upheld. The Notice of Motion dated 16th April, 2025 is devoid of merit and is hereby dismissed. A fair order on costs, in the circumstances of this case is that each party should meet their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF JULY,
2025.J.K. SERGONJUDGEIn the Presence of:-C/Assistant – RutohMwita for the
RespondentNo Appearance for Koske for the Applicant

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