



In re Estate of Kigen Cheboi Kipchorsoi (Deceased) (Succession Cause 141 of 1991) [2025] KEHC 2048 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 141 OF 1991
RN NYAKUNDI, J
FEBRUARY 14, 2025**

IN THE MATTER OF THE ESTATE OF KIGEN CHEBOI KIPCHORSOI DECEASED

BETWEEN

**CHRISTOPHER KIPYEGO A. KIGEN 1ST PETITIONER
ALFRED KIMUTAI LAGAT ALIAS MICHAEL KIGEN 2ND PETITIONER
WILLIAM KIGEN 3RD PETITIONER**

AND

SANIEKO KIGEN OBJECTOR

RULING

1. This succession matter, which has remained unresolved for over three decades since its initiation in 1991, illustrates the enduring challenges that arise when family members contest the distribution of a deceased's estate. The Court has previously rendered four decisions, with the two latest decisions attempting to bring to finality this protracted litigation. Most recently, on 15th October, 2024, this Court issued orders directing the cancellation of specific land titles and their reversion to the estate of the deceased, Kigen Cheboi Kipchorsoi. The matter is now before the Court on two concurrent applications: one from the 2nd & 3rd petitioners dated 14th January, 2025 seeking implementation of the orders issued on 15th October, 2024, and another from the 1st petitioner/applicant dated 27th December, 2024 requesting a stay of implementation of those same orders pending an appeal. The persistence of these applications, despite the Court's repeated interventions, underscores the need for a definitive resolution that balances the interests of all beneficiaries while upholding the principles of succession law.
2. The application dated 14th January, 2025 for purposes of record and proper context seeks orders as follows:



- a. Spent
 - b. That the court orders issued on 15th October, 2024 by the Honourable Court be implemented by the County Surveyor Uasin Gishu County and the OCS Tembelio Police Station to provide security to the County Surveyor, Uasin Gishu County during the exercise of subdivision over those parcels of land known as Tembelio/Elgeyo Border Block 5 (Ex-Tooley)/10 Tembelio/YO Border Block 5 (Ex-Tooley)/2016 Tembelio/Elgeyo Border Block 4 (Koiwopturgut)/95 & Moiben/Moiben Block 9 (Manyatta)/15
 - c. That costs of this application be provided for.
3. The application is based on grounds that the Respondent has refused to voluntarily obey the orders of the Honourable Court despite being served. That it is impossible to implement the orders of the honourable court without the assistance of the police.
4. The application dated 27th December, 2024 by the 2nd and 3rd Petitioners seeks orders as follows:
- a. Spent
 - b. There be stay of the ruling delivered on 15th October, 2024 emanating from an application dated 3rd June, 2024 in Eldoret High Court Succession Cause No. 141 of 1991 pending the hearing and determination of this application.
 - c. There be stay of the ruling delivered on 15th October, 2024 emanating from an application dated 3rd June, 2024 in Eldoret High Court Succession Cause No. 141 of 1991 pending the hearing and determination of the appeal herein.
 - d. Costs of this application be provided for.
5. The application is supported by an affidavit sworn by Christopher Kipyego A. Kigen and based grounds that on 15th October, 2024 the court delivered its ruling on the application dated 3rd June, 2024 which favoured the Respondent and further has the effect of displacing the beneficiaries of the Estate of the deceased.
6. That having been aggrieved by the said ruling the Applicant lodged an appeal against the whole of the ruling.
7. The Applicant is one of the executors of the will of the Late Kigen Cheboi Kipchorsoi which was executed on 7th August 1990 and later revoked by the court vide its Ruling on 02/05/2023 in Eldoret High Court Succession Cause No. 141 of 1991.
8. On the 18.9.2023 the Applicant/Petitioner filled an application for amendment of the certificate of confirmed grant and mode of distribution dated 12.7.2023 whereby the court delivered its ruling on the 13th May 2024.
9. That upon the delivering the ruling the Honourable Judge ordered that:
- a. The consent of 12.7.2023 be the primary instrument in aligning the distribution of the estate.
 - b. The legal counsels seized of these proceedings together with the administrators to generate a final amended certificate of confirmation of grant.
 - c. The rectification should not fundamentally alter with the intention of the parties more specifically in changing the position of the established homestead.



10. That despite the court having issued the above directions the Respondent filed an application dated 3rd June 2024 seeking revocation of the titles and execution of the confirmed grant dated 12/7/2023 to which the court proceeded to cancel all the titles issued to the beneficiaries and the Deputy Registrar was ordered to effect transfer of the estate of the deceased in line with the confirmed grant dated 12/7/2023 upon the lapse of 60days.
11. That the said 60 days have since lapsed and the beneficiaries of the estate of the deceased are apprehensive of the fact that they are facing imminent danger of being displaced/evicted from their parcels of land which they have enormously developed homes and various structures.
12. The Respondents have already initiated the process of execution and have served the Applicants with the surveyor's charges to be incurred in the survey process.
13. Further the office of the County Surveyor has scheduled the sub division for 6th and 7th January 2025 which if not stayed would lead to destruction of homes leaving the beneficiaries homeless.
14. The beneficiaries are willing to have an amicable mode of distribution and have been in negotiation to come up with a fair and equitable share.
15. When the Ruling revoking the will of the Estate of Kigen Kipchorsoi was delivered on the 13/5/2023 the court stated that the rectifications which were to be done should not have fundamentally altered with the intention of the parties more specifically in changing the position of the established homesteads.
16. That the current ruling made on the 15th October 2024 has the effect of displacing the beneficiaries of the estate of the deceased namely:
 - a. The Applicant
 - b. Slyvestor Kiprotich Kimaiyo
 - c. Kenneth Kipkemboi Kipyego
 - d. Samson Kipchumba Rono
 - e. Among many other beneficiariesWhom have constructed permanent houses and made enormous developments having lived on the said parcels for the past 30 years with their families.
17. That the confirmed grant dated 12/7/2023 which was given force by the ruling dated 15/10/2024 will cause substantial loss and damage on the beneficiaries of the estate considering the fact that the beneficiaries had already been allocated properties in the accounts on how the estate was distributed as per the will and have made enormous development for the past 30 years.
18. That as it stands now there is a valid Appeal and there is a real and imminent danger that the Respondents may move to evict/displace the Applicant from the share allocated from the revoked grant of probate of a written will issued on 28th February 1992 while the Applicant is desirous of having the appeal heard and determined.

Decision

19. In this succession matter, which has spanned over three decades, the Court is confronted with two competing applications that underscore the delicate balance between implementing judicial orders and preserving the rights of aggrieved parties. Before the Court is an application dated 14th January,



2025, by the 2nd and 3rd petitioners seeking implementation of orders issued on 15th October, 2024, and a concurrent application dated 27th December, 2024, by the 1st petitioner requesting a stay of those very orders pending appeal. This procedural confluence raises a threshold question that demands immediate attention: whether this Court can entertain an application for stay of execution in a succession matter where the applicant has not first sought and obtained leave to appeal. The determination of this preliminary issue is crucial, as it goes to the heart of the procedural prerequisites established by jurisprudence in succession matters and will inevitably impact the Court's consideration of the implementation application.

20. The debate on whether leave is necessary before filing an appeal from the High Court exercising its original jurisdiction in succession cases remains a subject of scholarly discourse and judicial interpretation. Two distinct schools of thought have emerged from the jurisprudence, each anchored in compelling legal principles and constitutional considerations. The first school, epitomized by the Court of Appeal's decision in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR, posits that leave is a necessary prerequisite for appeals in succession matters. The Court stated:

“We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

21. This position found robust reinforcement in *John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another* [2019] eKLR, where the Court of Appeal unequivocally held that:

“

“9We re-affirm the decisions of this Court in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR and *Josephine Wambui Wanyoike v Margaret Wanjari Kamau & another* [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in *Makhangu v Kibwana* [1996] EA cited by the respondent was succinctly considered by this Court in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. (See also in *Re Estate of Mbiyu Koinange (Deceased)* [2015] eKLR; HCC Succession Cause No. 527 of 1981).

In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant.”

22. The second school of thought, however, draws its foundation from constitutional provisions, particularly Article 164(3) of the *Constitution* of Kenya, 2010. This perspective was articulated in



Peter Wabome Kimocho v Josphine Mwiyeria Mwanu [2014] eKLR, where the Court of Appeal acknowledged this constitutional dimension, observing that:

“There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the *Civil Procedure Act* is not automatically imported into the *Law of Succession Act*. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the *Constitution of Kenya 2010* that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the *Constitution*, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.”

23. In the present matter, the applicant's pursuit of a stay of execution pending appeal, without first obtaining the requisite leave, represents a procedural misstep that cannot be overlooked. The established jurisprudence, particularly as articulated in the Rhoda Wairimu case (*supra*), outlines a clear procedural sequence: leave must first be obtained before an appeal can be contemplated, and consequently, before a stay of execution can be entertained. This sequence serves not merely as a procedural hurdle but as a safeguard ensuring that succession matters proceed with the deliberate speed and finality they deserve while preserving the right of genuinely aggrieved parties to seek appellate review.
24. The application of these principles to the present case reveals a clear procedural irregularity that cannot be surmounted. When a party seeks to challenge a decision of the High Court in succession matters, they must first obtain leave, as this requirement serves as a crucial filtering mechanism ensuring that only meritorious appeals proceed to the Court of Appeal. As articulated in *Re Estate of Esther Wanjiru Ng'ang'a (Deceased)* [2024], the necessity of leave is not merely procedural formalism but a substantive requirement designed to promote the expeditious resolution of succession disputes.
25. The application for implementation of the Court's orders of 15th October, 2024 on the other hand, stands on firm ground. These orders were issued after careful consideration of the parties' submissions and the unique circumstances of this long-standing succession dispute. The Court's role in succession matters includes ensuring that its orders are effectively implemented to bring finality to these proceedings, which have often been characterized by protracted litigation spanning decades.
26. The Court cannot entertain an application for stay of execution when there is no valid appeal before it or properly contemplated through the established procedural channels. To do so would be to encourage a practice where parties could indefinitely delay the implementation of court orders without first establishing a proper foundation for their intended appeal. Such an approach would defeat the very purpose of the leave requirement as articulated in the jurisprudence.
27. Consequently, the application for stay of execution must fail for want of the necessary prerequisite being leave to appeal. The concurrent application seeking implementation of the Court's orders of 15th October, 2024, is properly before the Court and aligns with the imperative of bringing this succession matter to a conclusive end. The beneficiaries have waited long enough for the distribution of this estate, and further delay without proper legal foundation cannot be countenanced.



28. In conclusion, having carefully considered the two competing applications before this Court, the established jurisprudence from both the High Court and Court of Appeal makes it abundantly clear that an application for stay of execution in succession matters cannot be entertained before leave to appeal is sought and obtained. The procedural sequence is not merely a technical requirement but serves the fundamental purpose of ensuring that succession matters are concluded expeditiously while preserving legitimate appellate rights.
29. The applicant's failure to first seek leave to appeal is fatal to the application for stay of execution. This Court cannot put the proverbial cart before the horse by entertaining a stay application when there is no proper foundation laid for the intended appeal. To do otherwise would encourage procedural impropriety and further delay the implementation of valid court orders in a matter that has already spent over three decades in litigation.
30. During the administration of the estate, cognizance must be taken of the rights of the heirs as to the establishment of their respective matrimonial homes in respect of sons to the deceased in the context that the transmission of the shares should not extinguish their legitimate beneficial interest to those property improvement during the lifetime of the deceased or as earlier bequeathed by him on account of entitling them a portion of the estate to build their homes. In addressing this issue, the court takes judicial notice that customary laws as shaped within our legal system are such that patriarchal and extended family structure were distinctive features of inheritance. Patriarchy implied that the head of the family exercised all significant rights and powers in connection to land use structured around the nuclear ascending and descending generation of male line. Thus the entire family had an interest in the land and livestock and consequently customary law recognized outright ownership in very few items of property. From this economic social structure, certain important principles of succession developed within customary law in a multi-ethnic society like Kenya. This might be the case in which the beneficiaries to the deceased find themselves looking like a conflict with common law or the Succession Act. My answer to them is that there is not conflict for indeed in intestacy and application of customary law, no property was divided into shares under that system. The deceased family privately regulated the system of land use and occupation without any interference from outside authorities or institutions. Traditional customary law succession alternatively termed the official version revolved around the marital estate of the deceased whether he was monogamous or polygamous. If any of the sons elects to get married he ranks first in being shown a portion of the estate in which to establish a homestead. The nature of the system of marriage thereafter determined the order in which the house heirs succeeded.
31. Generally, with only a few exceptions, customary structures of property holding are male-centred and patrilineal. One explanation for this could be that marriage is generally virilocal-leaving only male members to protect, manage and continue to put family property to use. Another is that customary law of property ownership is founded on communalism which foster group rights, group land holding and intra-family social cooperation and mutual welfare support.
32. In this litigation, during the transmission of the estate by the administrators recognition should be given to the right to housing initially, as developed by the beneficiaries and occupied during the lifetime of the deceased and thereafter upon his death there is no question as to housing and temporary land use pending determination of the Succession dispute in this conclusion. In Article 2(5) &(6) of the constitution International Law is part of our sources of law to be applied to the facts of the case in order meet the ends of justice. I have in mind. The *International Covenant on Economic Social and Cultural Right* 1966. Widely considered as the central instrument for the protection of the right to adequate housing, refers to the right of everyone to an adequate...housing in its article 11. Other International and regional Instruments also contain this right (*CERD*, 1965 art 5 (iii) *CEDAW*, 1979 art 14(2)



(H) the [CRC](#) 1989 (art 27(3)) CRST 1952 art 21, [ICPMWFM](#) 1990 (art 43 (1) (d)) [CRPD](#) 2008 ARTS 2,5,(3) 9(1) (A), 22(1) 28(1) & 28 (2) (D) with regards to the [African Charter on Human and People's Rights](#) 1981. This indicates how dangerous it can be to destroy the houses built by the same beneficiaries under the guise that the inheritance rights provided in the certificate of confirmation of grant gives effect to that kind of action. However this court must emphasise the Director of Survey while undertaking the transmission and conveyance of this estate shall factor in the question of existing household and buildings of each individual beneficiary to ensure the legitimate expectation of them continuing to reside in the same units is not negatively impacted during the allotment of the specific shares.

33. At the core of this distribution under the intestate estate is the provisions of Article 27 of the [Constitution](#) and Section 38 as read with Section 40 of the [Law of Succession Act](#). The legislative scheme in both instruments is that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law of inheritance guarantees to all beneficiaries equal and effective protection without discrimination on grounds of race, Nation, nationality, Social Origin, Colour, Sex, Language, Religion, Political, Political opinion, Property, Birth or other status. In this regard, the administrators have a duty to ensure effective protection of the fundamental rights to inheritance without any discrimination. There is no beneficiary who should be deprived of any reasonable provision out of the estate for reason of birth, sex or gender. Recognising the contradictory interest that often plague extended polygamous families the intestate succession law was passed with the primary purpose of ensuring that both the spouse and children devolve the shares in accordance to the law. It is now common knowledge that when a man is alive all seems well until the day when he departs from this earth having numbered his days a right without an estate plan in place then the problem of inheritance comes into play. It is at that receiving end of his demise his wife or wives and children face the emotional trauma of the loss and the deprivation of their source of livelihood both as the head of the family and the creator of wealth subject of Succession dispute. In terms of this intestate succession, I beseech the beneficiaries not to fall into temptation of overreaching to the point of interfering with the rights of other beneficiaries on grounds that during the survivorship of the deceased they enjoyed superior rights as the rest of the family members. In the realm of inheritance, it has to be noted that the main function of the probate court is to facilitate distribution rather than govern and this is primarily to ensure families take the centre stage to drive the division of property after the death of the deceased. It goes without saying that inheritance is traceable way back to biblical authorship which recognises an support the rights of women as exemplified in the case of the daughters of Zelophehad. The recognition is clearly summarised in the book of Numbers to the effect that Zelophehad daughters are correct in their claim and therefore deserve to be given an inheritance along with their father's kinsmen and should not be denied inheritance ad descendants. The recognition that is due in the bible is of equitable rights being accorded to women and male child without any discrimination. Similarly, it is the court's believe that the Certificate of Confirmation of Grant shall be tilted towards the protection of the rights of women and male children embodying equality perspectives as much as possible as the starting point of distribution. There should be no male supremacy in realisation of Social Justice in terms of growth, peace, and security for this family particularly when it comes to intestacy and inheritance. While reviewing the instruments of succession, which came about a series of negotiations by the beneficiaries with respect to the land use and inheritance there is enough for everybody as described in the Succession Act. Fortunately, infusion of the customary law to the entire inheritance rights I presume may provide a just desert for the beneficiaries entitled to the estate under Section 29 of the Act.
34. In the instant case, notwithstanding the framework provided for in the Certificate of Grant of Confirmation, they increased tension that decreed orders in the matrix may give beneficiaries an



opportunity to manipulate the distribution to their own advantage so as to work against the welfare and enjoyment of inheritance rights is neither the scheme of the grant of representation nor the letter and spirit of the Law of Succession. The intestate succession model therefore provides a straightforward approach to proper distribution upon the death of the intestate including taking cognizance of certain rights acquired during the lifetime of the deceased more specifically establishment of various houses/ homesteads by individual beneficiaries. There is no formula of distribution tailored to render any one of them stateless or homeless. The characteristic features of the director of surveys within the context of distribution as provided for in the Certificate of Confirmation of Grant is to receive proposals from each beneficiary to come up with a deed plan or mutation based on representations and the pre-occupation rights applicable to each beneficiary. The residual shall then be distributed without resulting in an inconsistent intestate succession. The surveyor with expertise has the ability to factor in fairness, parity. Uniformity and proportionality within the legislative provisions ordained in the certificate of confirmation of Grant.

35. Accordingly, I make the following orders:

- a. That the application dated 27th December, 2024, seeking stay of execution is hereby dismissed.
- b. That an application dated 14th January, 2025, seeking implementation of the orders issued on 15th October, 2024, is allowed.
- c. That the County Surveyor, Uasin Gishu County shall proceed with the subdivision of the parcels of land known as Tembelio/Elgeyo Border Block 5 (Ex-Tooley)/10, Tembelio/ YO Border Block 5 (Ex-Tooley)/2016, Tembelio/Elgeyo Border Block 4 (Koiwopturgut)/95 & Moiben/Moiben Block 9 (Manyatta)/15 in accordance with the Court's orders of 15th October, 2024.
- d. That the OCS Tembelio Police Station shall provide security to the County Surveyor during the implementation exercise.
- e. That the administrators adopt appropriate measures within the basic structure of the certificate of confirmation of grant to embody the principle of equality and equity to ensure the effective protection of any of the beneficiaries against any act of discrimination during the transmission of the estate.
- f. That Given that this is a family matter, each party shall bear their own costs.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE

