



In re Estate of the Late Taplelei Chelangat Chemaigut (Deceased) and Sigei Tabutany Chemaigut (Deceased) (Succession Cause 29 of 2019) [2025] KEHC 2768 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 29 OF 2019
JK SERGON, J
MARCH 13, 2025**

BETWEEN

THOMAS KIPKEMOI Z TOWETT 1ST PROTESTOR

ANDREW KIPKORIR TONUI 2ND PROTESTOR

AND

LIDWIN CHEPKEMOI TOO PETITIONER

RULING

1. The application coming up for determination is a chamber summons dated 5th November, 2024 seeking the following orders;
 - i. Spent
 - ii. That this Honourable Court be pleased to grant an order that the Notice of Appeal lodged on 22nd March, 2024, be deemed to have been duly filed.
 - iii. That in the alternative and absolutely without prejudice to prayer (ii) above, this Honourable Court be pleased to grant the Applicant leave to file appeal out of time against the Ruling of this Honourable Court dated 19th March, 2024.
 - iv. Spent.
 - v. That there be stay of execution and implementation of the Ruling; pending the hearing and determination of the Appeal.
 - vi. That the necessary directions be given.
2. The application is based on the grounds on the face of it and the supporting affidavit of Thomas Kipkemoi Z. Towett the 1st Applicant herein hence competent to swear this affidavit and duly authorized by the co-applicant herein to swear this affidavit on his behalf.



3. He avers that on 19th March, 2024, this honourable court rendered a Ruling in which inter alia dismissed their application for review of the orders dated 1st July, 2022 confirming the grant of representation to the estate herein by redistributing the share of the 2nd house equally amongst representatives of the two children namely the late Robert Too and the late Rose Chepkoske Chepkwony, to wit, the Respondent and the 1st and 2nd Applicant respectively.
4. He avers that being aggrieved by the said Ruling they promptly lodged a Notice of Appeal against it on 22nd March, 2024 and attached a copy of the Notice of Appeal.
5. He avers that through his advocates, he requested for a certified copy of the proceedings vide a letter dated 22nd March, 2024, which proceedings and ruling were furnished.
6. He avers that upon research that it became apparent that emerging jurisprudence indicates that appeals on succession matters from this honourable court are not lodged as a matter of right but subject to leave of either this court or court of appeal.
7. He avers that the delay in lodging this application was occasioned by the fact that they were under a mistaken impression that they had a competent appeal on record pursuant to our Notice of Appeal.
8. He avers that this court is vested with discretion to grant leave to appeal or even direct that an appeal has been deemed to be filed and that in the alternative, they do pray that this honourable court does grant leave to lodge an appeal against the Judgment out of time.
9. He avers that they have an arguable appeal with high chances of success and attached a copy of the draft Memorandum of Appeal
10. He avers that they were ready and willing to offer such security and/or abide by such terms as this Honourable Court may deem fit and just to impose.
11. He avers that this Honourable Court is vested with the discretion to grant stay of execution against the terms of the said Ruling and Order delivered on 19th March, 2024.
12. He avers that unless an order of stay of execution, proceedings and/or implementation of the said Ruling is granted, they are apprehensive that the Respondent may imminently cause the implementation of the impugned Ruling thereby rendering the appeal nugatory.
13. He avers that unless the application is allowed, they stand to suffer substantial loss and prejudice as the substratum of the appeal would be lost in the event the estate is distributed and/or alienated before the Court of Appeal renders itself on the appeal.
14. He avers that this application has been made in pursuit of the interests of justice and without unreasonable delay.
15. Lidwing Chepkemoi Too the respondent herein filed a replying affidavit in response to the application.
16. She avers that the said Application is misconceived, frivolous, vexatious, incompetent, and aimed at defeating justice and denying them the enjoyment of lawfully acquired justice.
17. She avers that the Applicants upon getting the said Ruling which was delivered on 19th March 2024, did not move in speed to file an appeal or even a notice of appeal which is mandated by civil procedure rules as well as court of appeal rules. They waited until they filed this instant application and annexed a back-dated Notice of Appeal and as such the said Notice of appeal is filed after undue delay and no plausible explanation of the delay has been tendered and thus it was a delaying tactic.



18. She further avers that there is no evidence of the said Notice of Appeal on the court file or even the CTS platform. Additionally, the same is not signed and/or sealed by the Deputy Registrar of the High Court and that they were never served with the same.
19. She avers whereas the court has unfettered discretion to grant stay of execution and leave to appeal but upon the applicants demonstrating sufficient cause so as to warrant exercise of the said discretion in their favour.
20. She avers that the Ruling of 19th March 2024 contains a negative order which did not order any of the parties to do anything or restrain from doing anything and as such it is incapable of execution and thus the court cannot order a stay of execution of that negative order.
21. She avers that the Ruling dated 19th March 2024 dismissed the Application dated 17th November 2023 that sought to Review the Orders dated 1st July 2022, that confirmed the grant of representation.
22. She avers that the Applicants are not the beneficiaries or direct dependants of the late Tablelei Chelangat Chemaigut (Deceased) or Sigei Tabutany Chemaigut (Deceased).
23. She avers that the Applicants have failed to produce the requisite, as per the Law of succession act, limited grant or grant of letter of administration given to them in regard to the estate of Rose Chepkoskei Chepkwony (deceased).
24. She avers that the requirement on security is at the discretion of the court and while not intended to fetter the right of appeal should not aid litigants to delay execution of decrees through filing of vexatious and frivolous appeals.
25. She avers that the Applicant's draft Memorandum of Appeal annexed to the Application does not raise any triable issue but consists of mere denials and as such the same is a sham.
26. She avers that this application has been brought after inordinate delay. Delay which has not been satisfactorily explained.
27. She further avers that further to the above contents, that time limited to file and serve a notice of appeal has long since lapsed and no sufficient reasons has been proffered for the delay.
28. Having considered the application and the responses herein the issue (s) for determination are whether to grant leave to appeal out of time and a stay of execution and/or implementation of the ruling of this court dated 19th March, 2024.
29. On the issue as to whether to grant leave to file an appeal out of time. One one part, the applicants argued the delay in lodging the appeal was occasioned by the fact that they were not privy to the fact that there is no automatic right of appeal from judgments/orders made by the High Court on succession matters and that the right of appeal is subject to leave of either this court or court of appeal. On the other part, the respondent was adamant that the time limited to file and serve a notice of appeal has long since lapsed and no plausible explanation had been proffered for the delay.
30. Based on numerous case law, there is no doubt that there is no automatic right of appeal from the judgments/decrees and orders made by the High Court in succession matters. However, the Court of Appeal has rendered conflicting decisions on whether or not High Court decisions under the act are appealable and whether leave is required. Section 50 of the Law of Succession Act provides that appeals from the decree and order made by the Resident Magistrate courts shall lie to the High Court whose decision thereon shall be final. The Law of Succession Act has no provision for appealing decrees and orders made by the High court. In Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others



[2013] eKLR, Otieno- Odek, JA, found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required whereas in Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR, Musinga, Ouko and Kairu, JJA found that such leave was necessary. The issue of leave notwithstanding, it is clear that the applicant wishes to appeal against the ruling of this court dated 19th March, 2024, in which this court dismissed the Application dated 17th November 2023 that sought to review the Orders dated 1st July 2022, that confirmed the grant of representation and mode of distribution of the deceased's estate. The applicant having ventilated their issues on review, after losing the application for review, they are now seeking to re-open the matter on appeal. In HA v LB HCCC No188 of 2021 Odunga J (as he then was) the stated: "Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the court's seal of approval to persons who wish to play lottery with judicial process."

31. On the issue as to stay of execution and/or implementation of the ruling of this court dated 19th March, 2024. Having carefully looked at the proceedings in the instant succession cause, it is clear that vide the ruling of this court dated 19th March, 2024, this court rendered its finding to wit that the application dated 17th November, 2023 seeking to review the orders of this court dated 1st July, 2022 confirming the grant of representation to the estate and mode of distribution, did not disclose any ground (s) for review thereby warranting the intervention of this Court and therefore proceeded to dismiss the said application. It is evident that the ruling of 19th March 2024 contains a negative order which did not order any of the parties to do anything or restrain from doing anything and as such it is incapable of execution and therefore this court cannot order a stay of execution of a negative order. The dismissal order is in the nature of a negative order and is therefore incapable of execution. It is a settled principle in law that there can be no stay of a negative order hence this court cannot grant the orders sought, in the case of Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR, where the court expressed thus:- "...The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise."
32. In the light of the foregoing, it is manifest that the chamber summons dated November 5, 2024 is unmerited. It is dismissed with each party bearing their own costs.



DELIVERED, SIGNED AND DATED AT KERICHO THIS 13TH DAY OF MARCH, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Cherono holding brief for Langat for the Protestor/Applicant

No Appearance for the Respondent

