In re Estate of the Late Kibet Sang (Deceased) (Succession Cause E105 of 2020) [2025] KEHC 2736 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE E105 OF 2020

RN NYAKUNDI, J

MARCH 11, 2025

IN THE MATTER OF THE ESTATE OF THE LATE KIBET SANG (DECEASED)

BETWEEN

PAULINE JEPKEMOI KIBET ..... 1ST PETITIONER

ELIZABETH JEPCHIRCHIR SANG ..... 2ND PETITIONER

JULIUS KIPKEMBOI KIBET ..... 3RD PETITIONER

AND

MARY CHEPYATOR KOSSOM ..... 1ST OBJECTOR

RAEL KIBET ..... 2ND OBJECTOR

ROSE SANG ..... 3RD OBJECTOR

SYLVESTER KIPLAGAT KIBET ..... 4TH OBJECTOR

RULING

1. This matter appears to be taking on the character of perpetual litigation. Since the distribution of the estate of the late Kibet Sang was first addressed by this court in July 2022, there has been a steady stream of applications seeking to alter, overturn, or stay the implementation of the court's determinations. The court is now faced with yet other applications: One for review dated 30th January, 2025 by Tecla Kibet and Stephen Kibet, which follows closely on the heels of the Notice of Motion applications dated 4th December 2024 and 19th December 2024 that were filed earlier.

2. While the court recognizes the emotive nature of succession matters, particularly those involving extensive land holdings and multiple beneficiaries from a polygamous household, there comes a point where judicial economy and the interests of justice require finality. This estate has remained in a state

of administrative limbo for fourteen years, during which time the beneficiaries have been unable to fully realize their inheritance rights.

3. The court has gone to extraordinary lengths to ensure equitable distribution in this matter; conducting site visits, ordering comprehensive surveys, considering the practical realities of existing settlements, and even attempting mediation between the parties. The distribution scheme outlined in the Certificate of Confirmation of Grant dated 15th November 2024 represents the culmination of these extensive processes.

4. It is against this background that the court must now consider the three applications before it: The Notice of Motion dated 4th December 2024 seeking injunctive relief, the application dated 19th December 2024 seeking leave to appeal, and the new application for review filed by Tecla Kibet and Stephen Kibet dated 30th January, 2025.

5. The application dated 4th December 2024 seeks an injunction against the respondents as follows;

    a. Spent

    b. Spent

    c. There be temporary stay of execution of the Ruling and Orders of this Honourable court delivered on the 1st of November 2024. There be interim orders of injunction restraining the Respondents either by themselves or through their agents, employees and/or servants from selling, alienating, charging, disposing of, leasing out, dealing in, wasting fencing or otherwise destroying crops and trees growing on that parcels of land allocated to the beneficiaries (Mothers, Sons and Daughters) pending the Hearing and final determination of the intended appeal.

6. The application is premised on the grounds on the face of it and the contents of the affidavit in support of the same. The application dated 19th December seeks the following orders;

    a. Spent.

    b. That the Applicants/Intended Appellants herein be granted leave to appeal against the Ruling of the Honourable court delivered on 15th November, 2024.

    c. That the Ruling delivered on 1st November 2024 in the matter herein, the proceedings herein including the said Ruling together with all consequential Orders/Decree transmission, survey, subdivision, lease, sale or any transaction relating to the Estate property herein be stayed in the interest of Justice and fairness pending Hearing and Determination of the intended Appeal.

7. The application is premised on the grounds on the face of it and the contents of the affidavit in support of the application.

8. Finally, in the application dated 30th January, 2025, the applicants seek reliefs that:

    a. Spent

    b. The Ruling and/or order of this honourable court made on 15th November 2024 distributing the estate of the deceased be reviewed.

    c. That costs be borne by the estate

9. As the injunctive relief is sought in the applications dated 4th December, 2024 and the one dated 19th December, 2024, the application dated 19th December 2024 will essentially determine the fate of both applications.

10. The applicant, in his affidavit, deponed that this court delivered the ruling in respect to this matter on 15th November 2024 and issued an amended grant of letters of administration which was full of fundamental factual and legal errors. The applicants have lodged a notice of appeal which the deponent annexed to the application. They believe that the appeal has high chances of success and they shall suffer prejudice, irreparable loss and substantial injustice of the orders sought herein are granted. The deponent urged the court to allow the application and stay the ruling.

Replying Affidavit

11. The 2nd Petitioner filed a replying affidavit dated 13th January 2025 sworn by the 2nd Petitioner, in response to the application dated 19th December 2024. She deponed that the application is defective, scandalous and an abuse of the court process. Further, that the court delivered its judgement with respect this estate on 28th July 2022 setting the mode and manner in which the identified the free property of the deceased was to be distributed. As per the judgement, the surveyor was to visit the property and provide a framework of distribution, which exercise was conducted. The parties were directed through an order of 27th February 2023 to facilitate entry of the surveyors for purposes of recapturing the acreage as indicated in the title deeds. The surveyors filed a report confirming that they competed the task given by the court through the report dated 1st August 2023. The court then made an order on 3rd July 2023 directing the surveyors to make additional footnotes in the heritage of occupation. She deponed that as per the report, it became evident that it was necessary to review the grant as some people were going to be evicted from where they had been residing permanently. Further, it became apparent that the mediation agreement had not been incorporated into the grant and that also necessitated a review of the grant. The court then visited the estate which gave the court first hand information and the picture of how the estate looked like. The matter was also referred to mediation

12. The deponent averred that the applicant has not met the required threshold for the court to grant the orders sought and further, that the parties have exhausted all legal avenues to inherit the estate which have taken 14 years and therefore adding more time will not satisfy the applicant.

Applicants' submissions

13. Learned counsel for the applicant filed Submissions dated 15th January 2025 through the firm of Messrs. Songok & Company Advocates. Counsel submitted that the application is in order, has been brought timeously and that since the chief subject issue in the matter herein involves land, the matter is very emotive and as such it is necessary and in the interest of justice that the orders sought be granted.

14. Counsel submitted that there is need that the court issues a temporary stay of execution of the ruling and orders issued on 15th November 2024 as prayed as the Respondents are on the verge of executing the said Ruling and/or Orders. Further, that the mode of distribution provided in the impugned Ruling was initially proposed by the second Petitioner and the court adopted it in its entirety to the Objector/Applicant's detriment.

15. Additionally, he stated that the said distribution mode only favours the Respondents at the expense of the Objectors/Applicants since it was prepared by the second Petitioner who took her interests and those of the other Petitioners first to give a proposal that unfairly distributes property to the Objectors.

16. Counsel urged that the mode of distribution proposed by the high court has caused injustice, particularly to the Applicants and their dependents as the respondent's houses have received more as compared to the applicant's house. That it is trite law that whenever a polygamous person dies intestate, his estate ought to be distributed equally amongst his wife's houses. Counsel cited section 40 of the *Law of Succession Act* and urged that the mode of distribution was not in compliance with the law. He stated that the 1st wife contributed immensely to the acquisition of the property forming part of the estate of the deceased yet she was not awarded any property when her fellow wives were, allocated property. He urged that this was an injustice and that stay should be granted. He cited the decision of the Court Appeal of decision of *Esther Wanjiru Githatu v Mary Wanjiru Githatu* [2019] eKLR in support of this submission.

17. Counsel submitted that the conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 rule 6(2) *Civil Procedure Rules*, Under the said provision, an Applicant must satisfy the court that:

    a. substantial loss may result to the applicant unless the order is made

    b. the application has been made without unreasonable delay; and

    c. the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

18. He urged that he has demonstrated that all above listed conditions exist in the matter herein and to the applicant's favour and as such, prayed the court to allow the application.

19. Counsel submitted that it is necessary that this court issues the sought interim order of injunction pending appeal and orders that status quo be maintained in order to prevent the Petitioners from proceeding to execute the Ruling issued by this court on 15th November 2024. Further, he cited the case of *Gladys Ong'udi Okoth vs Richard Ouma Odie* (2021) eKLR on the principles that guide the court in granting an order for stay and urged that their application met the required threshold. He urged the court to allow the applications in their entirety.

Respondents' Submissions

20. The respondents filed submissions dated 17th January 2025 through the firm of Messrs. Mathai & Company Advocates. Counsel began by addressing the issue of granting leave for the appeal. He submitted that the debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. Additionally, he stated that there are various schools of thought on the issue.

21. Counsel submitted that one school of thought posits that there is necessity of leave to appeal in succession matters; and the reasons advanced by the proponents of this school of thought are two-fold. The first one was well captured in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* (2014) eKLR by the Court of Appeal in these words: -

> "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."

22. The second, which has its origins in the Anarita Karimi case, was enunciated in the case of *Mary Wangui Karanja & Another v Rhoda Wairimu Karanja & Another* (2014) eKLR, by Musyoka J. to be that-

> " ...A right of appeal is statutory and since the *Law of Succession Act* has not provided for such a right the same does not exist."

23. Counsel posited that another school of thought takes the view that the Constitution of Kenya, 2010 provides for unfettered right of appeal. And such provisions in the *Law of Succession Act* requiring leave to appeal being existing law should be dealt with in accordance with section 7(1) of the Transitional Provisions in the Sixth Schedule of the *Constitution*. He urged that the Court of Appeal recognized this dichotomy of opinion in the case of *Peter Wahome Kimotho v Josephine Mwiveria Mwanu* (2014) eKLR).

24. Counsel cited a plethora of cases and urged that the focus should be on the considerations a court should take into account in granting or refusing leave. He submitted that this necessity emerged in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* (2014) eKLR According to this precedent, leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. Additionally, he urged that the exercise of the discretion in granting leave to appeal in succession causes should be underpinned by the right of appeal provided in the *Constitution*.

25. Counsel submitted that the applicants have expressed grievance on the decision of this court and wish to litigate in the Court of Appeal. He urge that as the court considered the situation on the ground after visiting the land, and took into account the dwelling houses, he did not see anything substantial which may require further and serious discriminating interrogation by a higher court. The main question that needs to be answered is whether the Applicants have placed material that would warrant the court to exercise its discretion into their favour. Counsel urged that the supreme court in *Parliamentary Service vs Martin Nyaga Wambora & 31 Others* (2018) eKLR laid out the dictum discretionary power may be excised by judges. The standards set was inspiration drawn the traditionally set guidelines in *Mbogo & Another vs Shah* [1968] EA93.

26. Counsel pointed out that the Applicants have not demonstrated which injustice that was occasioned by the Ruling that was delivered dated 15th November, 2024, bearing in mind that the said ruling was not independent from the judgment of the court that was delivered on the 28th July, 2022 which distributed the estate and not the Ruling of the court that was delivered on the 15th November, 2024. If the Applicants intended to challenge the distribution they ought to have appealed against the judgment of 28th July, 2022. Further the gravamen by the Applicants is that there are acreages that are unaccounted for, that is not a factual issue or legal issue to be determined at the appeal but rather an issue that can be sorted through survey of the disputed parcels of land. The Applicants have also not put any material to demonstrate that indeed there are acreages that are unaccounted for.

27. Counsel urged that the matter has been in court for 14 years and parties have exhausted all avenues to enable the parties come up with a win win situation, but out of selfish interest, parties drew hardlines to the expense of justice. This court visited the estate took notes and also directed parties to mediation, an opportunity they chose to waste and therefore the court had no option but enforce the judgment it delivered on 28th July, 2022 by reviewing it. Allowing an appeal where no material facts have been placed before the court would amount to a great injustice and take this family 14 years back.

28. Counsel submitted that stay of execution pending appeal is a discretionary power but, which must not be exercised on whims, but judiciously; on defined principles and the facts of the case. The objective of stay of execution is to prevent substantial loss from befalling the applicant; ordinarily, it is to prevent the appeal from being rendered nugatory. Counsel cited the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* (2012) eKLR in support of this submission. He stated that the Applicants have not demonstrated that they will suffer substantial loss if the stay is not granted, nor that they will be displaced from their homes resulting in rude and irreparable disruption to their lives. The court visited the land and determined the mode of distribution after considering all factors including placement of the beneficiaries on the land, dwelling houses and other essentials like access to water and road. He stated that he did not see how implementation of the grant or changes of boundaries will cause rude displacement of the applicants from their homes. Further, that the Applicants are merely obsessed with getting particular portions or parts of the estate property.

29. He urged the court to dismiss the application in its entirety.

30. The review application dated 30th January 2025 is premised on multiple grounds as set forth in the supporting affidavit sworn by Tecla Kibet. The applicants contend that:

    a. There are errors apparent on the face of the record in that the Court distributed the estate in a manner that is unfavourable to the first house, yet the 2nd and 3rd houses are provided for to the disadvantage of the 1st house.

    b. Part of the estate was left undistributed and part was partially distributed.

    c. Some beneficiaries were displaced from where they have set up permanent residences and moved to far-flung parts of the estate, and one was moved from where he has buried his wife, causing trauma to his children, which creates difficulties in complying with the ruling.

    d. The ruling did not provide for Sally Jerono who immensely contributed to the acquisition of properties forming the estate of the deceased.

    e. The distribution schedule provides for a distribution that will further deepen contention and disputes between the beneficiaries.

    f. The ruling does not capture the survey report which recorded where the beneficiaries have set up permanent residences.

    g. The ruling did not distribute some moveable properties forming part of the estate of the deceased.

    h. The ruling has further deepened conflict among the beneficiaries to the estate of the deceased

Responses to the Application dated 30th January 2025

31. The 2nd Petitioner filed a replying affidavit sworn on 6th March, 2025 in which she deposed as follows:

    a. That the said application is fatally defective, does not raise any cause of action, its frivolous, vexatious, scandalous and an abuse of the Court process hence the same ought to be dismissed in limine.

    b. That the instant application seeking for orders of review is resjudicata the Honourable Court having rendered itself on a similar application dated 22nd March, 2023.

c. That the Honourable Court delivered its Ruling with respect to application dated 22nd March, 2023 on the 11th December, 2023 where it reviewed the grant.

d. That I further wish to state that the Honourable Court Ruling of 18th November, 2024 was reviewing the grant hence there cannot be review upon review.

e. That the Developments in Kaptagat/Kaptagat Block 1 (Losirwa)116 were done to steal a match after the court confirmed the amended grant since the purported developments were done on the 9th December, 2024.

f. That the purported development are not contained in the surveyors report that was prepared on the 1st August, 2023.

g. That the said purported development were not also there when the Honourable court visited the estate and took footnotes on the occupation of the beneficiaries.

h. That none of the girls has not been provided for either married or unmarried, they all have equal share with the rest of the beneficiaries.

i. That parties cannot choose where they want and hold the court at hostage after the grant has been confirmed.

j. That the distribution and subsequent confirmation was a result of the information that was given by the report that were done by the surveyors and also as per the title held by the deceased.

k. That the alleged acreage differential claimed by the Applicants is not supported by documentary evidence contradicting the one already that was filed by the surveyors.

l. That the Applicants herein through a witness statement dated 19/08/2020 stated that priority should be given to boys to retain the parent's homesteads.

m. That the parcels of land are also held subject to the overriding interests as provide for pursuant to Section 25 and 28 of the *Land Registration Act* No. 3 of 2012. Since some contains reserve roads, riparian land, railway reserved land and hence all those factors affect the acreage.

32. The 3rd Petitioner equally filed a replying affidavit in which he deposed as follows:

a. That the Applicant hails from the 1st house of the deceased's estate just as I do. I wish to confirm that no beneficiary from the 1st house was omitted during the distribution process. Furthermore, it is noteworthy that the 1st house was apportioned their share of the property just like the other households, ensuring fairness and equity in the allocation.

b. That contrary to the allegations contained in the Applicant's supporting affidavit, I categorically state that the entire estate of the late Kibet Sang was duly distributed. In support of this assertion, I rely wholly on the Amended Certificate of Confirmation of Grant issued by this Honourable Court, which reflects the final distribution.

c. That for the avoidance of doubt, no beneficiary who had established a permanent residence on any portion of the estate was displaced during the distribution process. The allocation was meticulously designed to respect the existing residential arrangements of all beneficiaries.

d. That with regard to the issue of Stephen Kibet, raised by the Applicant, I aver that his share of inheritance falls within the parcel designated as Kaptagat/Kaptagat/block 1 (Losirwa) 116. This matter is to be resolved during the subdivision process by the appointed surveyor, as directed by the Court, and does not constitute a substantive dispute at this stage.

e. That in response to paragraph 9 of the Applicant's supporting affidavit, I wish to clarify that the land known as Kipsinende/Kipsinende Block 8 (Lamaon) measures 13.7 acres in total. The Applicant's reference to an additional 4.1 acres arises from the inclusion of riparian land, and a road reserve, which do not form part of the distributable estate.

f. That there exists no genuine dispute regarding the schedule of distribution. The allocation was conducted equitably, with due consideration given to the permanent residences of all beneficiaries, thereby ensuring that no party was unfairly prejudiced.

g. That the survey report and the ruling of this Honourable Court expressly took into account the residence of each beneficiary. Beneficiaries such as Tecla Kibet and others, who are married and have established permanent residences elsewhere with their families, were allocated unoccupied parcels of land to avoid disrupting the existing familial arrangements.

h. That the undistributed moveable properties, specifically machinery, were addressed by this Honourable Court in its directions. The Court ordered that these assets be valued, sold, and the proceeds equitably shared among the beneficiaries, a process which remains ongoing and compliant with the Court's instructions.

i. That with respect to Tecla Kibet, I aver that she is married and resides peacefully with her family at her marital home. It would be contrary to cultural norms and principles of fairness for a married daughter to displace her brother, who resides in his matrimonial home, by seeking to settle with her husband on the said parcel. In any event, there are sufficient unoccupied parcels within the estate to accommodate her entitlement without necessitating such a disruption.

j. That the parcel identified as Plateau/Plateau Block 2 (UG) 84 belongs solely to me and does not form part of the deceased's estate. This fact is substantiated by the following incontrovertible evidence: (a). Family Minutes dated 21st February 2010, duly signed by all family members including the applicants herein. (b). A Partial Mediation Agreement dated 29th February 2020, which was adopted as an order of this Honourable Court; (c). The testimony of PW2 who is a widow of the deceased and lived with him, during the court proceedings, which corroborated my evidence; (d). The 2nd Mediation Report prepared by Professor Magerer; and (e). The ruling of this Honourable Court delivered on 15th November 2024.

k. That the parcel of land apportioned to me, namely Plateau/Plateau Block 2 (UG) 85, was settled upon me by my late father during his lifetime and was duly registered in my name prior to his demise. This allocation is therefore not subject to the present succession proceedings.

l. That any discrepancies in the recorded acreage of the estate parcels arise from the inclusion of non-distributable areas, such as riparian zones, road reserves, and railway lines. These factors were adequately addressed during the distribution processes.

m. That the parcels referred to as Koilel Farm (Kanori) Block 2 and Kaptagat/Lotonyok Block 2 (KOILEL) pertains to the same piece of land. This apparent duplication was rectified in the Amended Certificate of Confirmation of Grant dated 15th November 2024, thereby eliminating any confusion.

n. That there is no error in the distribution of the estate, as this Honourable Court meticulously considered all evidence on record and arrived at an equitable and just determination.

o. That the judgment in this matter has already been reviewed by this Court. It is a settled principle of law that this Honourable Court lacks jurisdiction to entertain a further review of a

reviewed judgment. Any party dissatisfied with the outcome is at liberty to seek redress by way of an appeal to the Court of Appeal, rather than through an additional application for review.

2nd petitioner's submissions

33. Learned Counsel Mr. Mathai submitted that the application is fatally defective. He argued that the applicants' application was not anchored on any provision of the law, he contended that it is not possible to determine from which provisions of the law the applicants are moving the court, and it cannot be assumed what they intended from the reliefs sought. Counsel emphasized that parties have a duty to inform the court of the provisions of the law they are invoking.

34. Mr. Mathai further submitted that the application dated 30th January 2025 was filed by Sonkule George who had filed a notice of change dated 26th January 2025, changing from the firm of Kigen & Co. Advocates to M/S Songule K. George. Counsel argued that at the time M/S Sonkule K. George was effecting the notice of change, judgment had been delivered on 28th July 2022, making it mandatory to comply with Order 9 Rule 9 of the *Civil Procedure Rules* 2010.

35. In support of his argument, counsel cited the case of *Monica Moraa vs Kenindia Assurance Co Ltd* (2010) eKLR, where the court stated that the issue of representation is critical especially in cases where the applicant's advocates intend to come on record after delivery of judgment. Counsel submitted that similarly, the notice of change done by M/S Songule K. George did not comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* 2010, as he did not obtain leave of the court through an application, nor was there any consent between the outgoing firm and him. Counsel argued that this rendered the application fatally defective and cannot be cured by relying on Article 159 of the *Constitution* of Kenya 2010.

36. On the issue of res judicata, counsel submitted that the substantive law is found in Section 7 of the *Civil Procedure Act* Cap 21. He cited the case of *Uhuru Highway Development Ltd vs Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Ansoklal Patel*, where the Court of Appeal stated that there must be an end to applications of similar nature, and that the principle of res judicata applies to applications within the suit.

37. Counsel also cited the case of *Niangu vs Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (Unreported Thuluba J), which held that if parties were allowed to litigate forever the same issue with the same opponent before courts of competent jurisdiction merely because of cosmetic face lifts, then there would be no use for the doctrine of res judicata.

38. Mr. Mathai argued that a similar application dated 22nd March 2023 seeking orders of review was filed, and the court delivered its ruling on 11th December 2023, amending the grant to include assets that had been left out. He submitted that the court further reviewed the grant through a ruling delivered on 18th November 2024, and it is this ruling that the applicants now seek to have reviewed. Counsel maintained that the court having pronounced itself on the issue of review, the instant application is thus res judicata and cannot be entertained but only dismissed.

39. Regarding differential in acreages, counsel submitted that the court had ordered the county surveyor to visit the estate twice, and reports were prepared detailing the sizes of parcels of land and occupation of the parties. He argued that these reports clearly demonstrate which structures were present during that exercise. Counsel noted that the court visited the estate and took notes on the occupation.

40. Counsel strongly contended that the applicants have constructed developments on 9th December 2024, after the grant had been confirmed, in an attempt to manipulate the court. He argued that "who seeks equity must come with clean hands," and that the applicants have approached the court through false

pretences and forgery for the sake of having the court review its orders. Counsel submitted that this is not only illegal but also an affront to legal procedure, as a beneficiary cannot dictate where they should be given part of the estate.

41. On the properties of the estate, counsel submitted that the titles are subject to overriding interests as recognized by Sections 25 and 28 of the *Land Registration Act* 2012, including riparian land, road reserves, and railway line reserves, which will affect the acreage. He maintained that the grant as drawn addresses all these issues, and the applicants have not annexed any survey reports to contradict what is already on record.

42. With respect to distribution of property, counsel submitted that all children of the estate, whether male or female, married or unmarried, received equal shares, with consideration placed on the size and value of the land. He argued that none of the children was discriminated against, and the only issue raised by the applicants is that they must be allocated land where they want, which counsel described as a misplaced mentality lacking legal grounds.

43. In conclusion, counsel submitted that the application is fatally defective and lacks merit, and ought to be dismissed. He noted that the same grounds being sought for purposes of appeal would automatically affect the application for leave to appeal once the court finds no merit.

3rd Petitioner's submissions

44. Learned Counsel for the 3rd Petitioner submitted that the application is devoid of merit, constitutes an abuse of the court process, and ought to be dismissed with costs. Counsel put reliance on the Replying Affidavit of Julius Kipkemboi Kibet and the annextures thereto.

45. Counsel submitted that the Applicants, who hail from the 1st house of the deceased's estate, contend that the distribution process was flawed. However, counsel argued that no beneficiary from the 1st house, including the Applicants, was omitted during the distribution. Indeed, counsel maintained that the 1st house was apportioned property equitably just like the other households, ensuring fairness and equity in the allocation.

46. Learned counsel further submitted that the entire estate was duly distributed as evidenced by the Amended Certificate of Confirmation of Grant issued by the Honourable Court on 15th November 2024. Counsel emphasized that this document, which is binding unless set aside on appeal, reflects a meticulous and equitable distribution process that respected the existing residential arrangements of all beneficiaries.

47. In support of this argument, counsel relied on the case of *Re Estate of Charles Koinange Mbiyu (Deceased)* [2015] eKLR, where the High Court held that the distribution of an estate must accord with principles of fairness and equity, taking into account the circumstances of each beneficiary. Counsel maintained that this principle was fully adhered to in the instant case.

48. Regarding the 2nd Applicant's concerns, counsel submitted that Stephen Kibet's share falls within the parcel designated as Kaptagat/Kaptagat/block 1 (Losirwa) 116, and this matter is to be resolved during the subdivision process by the appointed surveyor, as directed by the Court. Counsel argued that this is a procedural step, not a substantive dispute warranting review.

49. Counsel addressed the Applicants' allegation of discrepancies in the acreage of Kipsinende/Kipsinende Block 8 (Lamaon) 1, explaining that while the Applicants claim an additional 4.1 acres, the parcel measures 13.7 acres, and the additional area cited comprises riparian land and a road reserve, which are non-distributable public domains.

50. Regarding the 1st Applicant's request, counsel submitted that Tecla Kibet seeks to settle on a parcel occupied by her brother. Counsel argued that Tecla Kibet is married and resides peacefully with her family at her marital home, and it would be contrary to cultural norms and principles of fairness, as well as settled law, for a married daughter to displace a sibling from his matrimonial home when sufficient unoccupied parcels exist within the estate to accommodate her entitlement.

51. Counsel further submitted that the parcel identified as Plateau/Plateau Block 2 (UG) 84 belongs solely to the 3rd Respondent and does not form part of the deceased's estate. This is substantiated by Family Minutes dated 21st February 2010 signed by all family members including the Applicants, a Partial Mediation Agreement dated 29th February 2020 adopted as an order of the Court, testimony of a widow of the deceased, the 2nd Mediation Report by Professor Magerer, and the ruling of the Court dated 15th November 2024.

52. Similarly, counsel maintained that Plateau/Plateau Block 2 (UG) 85 was settled upon the 3rd Respondent by the deceased during his lifetime and registered in his name prior to the deceased's demise, thus treated as the 3rd respondent's share of inheritance.

53. On the legal aspect, counsel submitted that the judgment in this matter was reviewed by the Court, culminating in the Amended Certificate of Confirmation of Grant dated 15th November 2024. Counsel argued that it is a settled principle of law that a court cannot review a judgment that has already been reviewed unless there is a clear error apparent on the face of the record or new and important evidence emerges, neither of which applies in this case.

54. In support of this argument, counsel relied on Section 80 of the *Civil Procedure Act* (Cap 21) and Order 45 of the *Civil Procedure Rules*, 2010, which govern applications for review. Counsel cited the case of *National Bank of Kenya Ltd v Ndungu Njau* [1996] eKLR, where the Court of Appeal held that a party dissatisfied with a reviewed decision must seek redress through an appeal, not a further review. Counsel submitted that the Court lacks jurisdiction to entertain the present application, and the Applicants' remedy lies with the Court of Appeal.

55. Counsel further argued that the Applicants' application is an attempt to re-litigate matters already determined by the Court. The distribution was informed by extensive evidence, including survey reports, mediation agreements, and witness testimony, all of which were considered in the ruling of 15th November 2024. Counsel maintained that the Applicants, having participated in the process (as evidenced by their signatures on the Family Minutes), cannot now feign dissatisfaction to unsettle a fair and final determination.

56. In conclusion, counsel submitted that: the distribution of the estate was equitable, inclusive, and compliant with the law; the specific grievances raised by the Applicants are either procedural or unfounded; certain parcels claimed by the Applicants do not form part of the estate; the Court lacks jurisdiction to review a reviewed judgment; and the application is an abuse of the court process.

Analysis & Determination

57. The following issues arise for determination;

    i. Whether the applicants should be granted leave to appeal

    ii. Whether the orders of stay of execution should issue

    iii. Whether the review application is merited.

Whether the applicants should be granted leave to appeal

58. The question of whether leave to appeal should be granted in succession matters has generated considerable jurisprudential discussion. It is trite law that there is no right of automatic appeal to the Court of Appeal on a decision where the high court Is exercising original jurisdiction. In the case of *Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another* [2014] eKLR, the Court of Appeal made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction:

> "We think we have said enough to demonstrate 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. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

59. In *John Mwita Murimi & 2 Others v. Mwikabe Chacha Mwita & Another* [2019] eKLR, the Court of Appeal re-affirmed this position by holding as follows:

> "...Under the *Law of Succession Act*, there is no express automatic right of Appeal 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..." (sic)

60. In determining whether to grant leave to appeal, the court must examine whether the applicant has demonstrated prima facie grounds that merit serious judicial consideration. This requires more than mere dissatisfaction with the court's decision; it necessitates the identification of specific legal or factual errors that could potentially lead to a different outcome on appeal.

61. Upon careful review of their submissions, the applicants have failed to identify with any degree of specificity what these purported errors entail. They have not pointed to particular findings in the judgment that misapplied the law, misinterpreted evidence, or otherwise deviated from established legal principles. More critically, they have not demonstrated how any such errors, even if they existed, would materially affect the outcome of the case.

62. In my considered view such an application requires more than vague assertions of error or general expressions of dissatisfaction with a court's determination. An application for leave to appeal must present articulated grounds that, on their face, merit serious judicial consideration at the appellate level. The present application falls significantly short of this standard, offering instead generalized grievances without identifying specific, reviewable errors of law or fact.

63. This court undertook extraordinary measures to ensure equitable distribution. These included directing comprehensive surveyor reports (completed on 1st August 2023), conducting a personal site visit to understand the property's topography and the beneficiaries' living arrangements, and referring the matter to mediation. Having participated in these processes without substantive objection, the applicants cannot now claim prejudice from their implementation.

64. Ultimately, judicial economy and the interests of justice require that litigation must eventually conclude. This matter has been in court for 14 years, during which time the beneficiaries have been unable to fully access their inheritance. Allowing an appeal without substantive grounds would

unnecessarily prolong proceedings that have already spanned more than a decade, further delaying resolution for all parties concerned and potentially undermining the core purpose of the probate process.

65. Therefore, exercising my judicial discretion under Section 47 of the *Law of Succession Act*, I find that the application for leave to appeal lacks merit and must be denied.

On the Question of Stay of Execution

66. Having determined that the application for leave to appeal lacks merit, the question of stay of execution becomes moot. Nevertheless, for the sake of judicial thoroughness, I shall address the substantive considerations that would govern this question.

67. The attendant provision governing issuance of stay of execution orders in succession matters, as invoked by the applicants is Rule 49 of the *Probate and Administration Rules*. Rule 49 of the *Probate and Administration Rules* provides that:

> "A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit."

68. Additionally, the court can draw upon the powers under section 47 and Rule 73 of the Probate and Administration Rules in order to meet the ends of justice.

69. The governing statutory provision on stay of execution is Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides that;

> No order for stay of execution shall be made under sub rule (1) unless :
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

70. Stay of execution is a discretionary power which must be exercised on defined principles and facts. The court exercises its discretion in granting of stay of execution pending appeal. This was held in the case of *Butt v Rent Restriction Tribunal* (1982) KLR that: -

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

71. The main objective of stay is to prevent substantial loss which ideally, would serve the purpose of preventing the appeal from being rendered nugatory. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court held as follows : -

> " The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

72. A stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015) eKLR Gikonyo J opined that -

> ....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...

73. As this is a succession matter, the applicants are not in a position to offer security as a condition of stay. The main determinant would be the substantial loss that would be occasioned if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard* (No 2) (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that –

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

74. Rather than establishing substantial loss, the applicants' arguments reveal a preference for particular portions of the estate rather than genuine concern about equitable distribution. The court's distribution, developed through extensive processes including surveyor reports, site visits, and mediation attempts, already ensures that each beneficiary receives a fair share while respecting existing occupancy patterns. Further delay in implementing this scheme would only prolong the 14-year wait that beneficiaries have already endured to access their rightful inheritance. Therefore, even if leave to appeal had been granted, the prayer for stay of execution would still have been denied on its merits.

On the review application dated 30th January, 2025

75. Regarding the review application dated 30th January, 2025, a preliminary issue arises concerning representation. The application was filed by M/S Sonkule K. George who had filed a notice of change dated 26th January 2025, changing from the firm of Kigen & Co. Advocates. It is noteworthy that at

the time of effecting this notice of change, judgment had already been delivered on 28th July 2022, and more significantly, the Amended Certificate of Confirmation of Grant dated 15th November 2024 constituted a final decree of this court. Order 9 Rule 9 of the *Civil Procedure Rules* 2010 explicitly provides that where judgment has been pronounced, an advocate cannot come on record for a party except by leave of the court, which must be obtained through a formal application, or by filing a consent duly signed by the outgoing advocate. In the present case, M/S Sonkule K. George neither obtained leave of the court through a proper application nor filed any consent from the outgoing advocates. This procedural irregularity renders the application fatally defective, as the principle of proper representation is fundamental to the orderly administration of justice, particularly in succession matters where finality of proceedings is of paramount importance. The court cannot countenance such a procedural impropriety, especially where it appears designed to reopen settled matters guised as a review application.

76. Notwithstanding this procedural defect, the court has, in the interest of substantive justice and in accordance with Article 159(2)(d) of the *Constitution* which mandates that justice shall be administered without undue regard to procedural technicalities, taken the liberty to examine the merits of the application. This approach is consistent with the court's obligation to ensure that all parties receive a fair hearing and that succession matters are resolved comprehensively and equitably.

77. Is there is a mistake or error on the face of the record or any sufficient reason to justify review of the ruling herein?

78. Under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

79. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See *Paul Mwaniki v NHIF Board of Management* [2020] eKLR;

80. Is there any such mistake or error on the face of the record?

81. Having meticulously examined the ruling dated 15th November 2024, which the applicants seek to review, I find no mistake or error apparent on the face of the record that would warrant a further review. The November 15th ruling itself was a considered review of the earlier Certificate of Confirmation of Grant dated 11th December 2023, undertaken after the court conducted a site visit to address implementation challenges. That ruling systematically addressed each contested parcel of land, carefully considered the claims of purchasers, and took into account the established residences of beneficiaries to minimize disruption to existing family arrangements. The distribution scheme outlined in that ruling represents a balanced approach that respects both legal imperatives and practical realities.

82. The applicants' contentions regarding unfavourable distribution to the first house are not supported by the record. The impugned ruling specifically addressed the rights of all houses, including ensuring William Kiprotich Bett of the first house remained on Kaptagat/Kaptagat Block 1 (Losirwa) 116 where he had established his residence and where his parents are buried. This decision was explicitly made to maintain cultural and familial connections. Similarly, other beneficiaries from the first house received substantial allocations that were proportionate to those of the second and third houses. As for the claim that the ruling did not provide for Sally Jerono, it must be noted that Sally Sang (as referred to in paragraph 37 of the November 15th ruling) is deceased, and as a matter of law, property cannot pass to a deceased person. Rather, her children, including William Kiprotich Bett who was specifically

mentioned as the first-born son of Sally Sang in paragraph 7(b) of the November 15th ruling, were properly included in the distribution as her legal heirs. This approach is consistent with succession law principles that recognize that inheritance rights pass to descendants when a potential beneficiary predeceases the person whose estate is being distributed.

83. Regarding the allegation that some beneficiaries were displaced from their established residences, the record shows the opposite. The impugned ruling specifically prioritized maintaining existing residential arrangements where possible. The court took extraordinary measures, including conducting a site visit and reviewing surveyor reports, to ensure that beneficiaries could remain in their established homes. Where adjustments were necessary, they were made with careful consideration of all factors, including cultural norms and family cohesion.

84. The assertion that the ruling did not capture the survey report is plainly contradicted by the record. The November 15th ruling explicitly references the survey report throughout, using it as a primary basis for determining existing occupancy patterns and making distribution decisions. Indeed, paragraphs 37-39 of that ruling specifically discuss the survey findings regarding Kipsinende/Kipsinende Block 8 (Lamaon) 1, and similar references appear throughout the judgment.

85. The claim that the ruling did not distribute moveable properties is similarly unsupported. Paragraph 57 of the November 15th ruling contains a detailed schedule that explicitly allocates the machinery and equipment to each house. Additionally, paragraph *56*(c) directs a professional assessment of machinery whose value may have been affected by depreciation.

86. In essence, what the applicants present as grounds for review are actually expressions of dissatisfaction with the distribution scheme rather than identifiable errors or omissions in the ruling. The *Law of Succession Act*, particularly Sections 38 and 40, provides the framework for distributing an estate in a polygamous setting, and it is this court's position that the ruling adhered to these provisions while balancing practical considerations. The distribution scheme therein represents an attempt to resolve complex, often competing claims in a manner that preserves family harmony while respecting legal entitlements.

87. Furthermore, it is a well-established principle that a court cannot entertain a review of a reviewed judgment. I am of the considered view that a party dissatisfied with a reviewed decision must seek redress through an appeal, not a further review. As the 15th November, 2024 ruling itself was a review of the 11th December, 2023 distribution, the applicants' proper recourse, if dissatisfied, would be to appeal rather than seek another review.

88. In conclusion, I find that the application for review dated 30th January 2025 fails to meet the threshold established under Order 45 Rule 1 of the *Civil Procedure Rules*. The applicants have not demonstrated any mistake or error apparent on the face of the record, nor have they presented any new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge when the court made its determination on 15th November 2024. The application appears to be an attempt to re-litigate issues that have already been thoroughly considered and determined. Accordingly, this application is dismissed.

89. It is imperative to emphasize that this probate court, like any court administering an estate, cannot satisfy every individual beneficiary's personal preferences or desires regarding specific portions of the estate. The fundamental duty of a probate court is to ensure equitable distribution in accordance with the law, not to cater to individual wishes about which particular parcels each beneficiary might prefer. As this court has demonstrated through its extraordinary efforts; including site visits, surveyor reports, and multiple reviews, the focus must remain on the equitable administration of the entire

estate rather than accommodating subjective preferences of individual beneficiaries. Were this court to attempt to satisfy each beneficiary's personal preference for specific parcels, the administration of this estate would continue indefinitely, defeating the very purpose of succession law: to bring finality and certainty to the distribution process. The court must balance individual interests against the collective good of all beneficiaries, and sometimes this necessitates decisions that may not align with every beneficiary's ideal outcome. This principle is particularly important in polygamous households with multiple beneficiaries across different houses, where the court must ensure fairness between houses while respecting established occupancy patterns. The applicants' insistence on revisiting a carefully considered distribution scheme appears to stem from preference rather than legal entitlement, and such preferences cannot form the basis for review.

90. In seeking to advance any of the beneficiaries case, this court cannot avoid to invoke Section 7 of the *Civil Procedure Act* on the doctrine of res-judicata which protects administration of justice against the parties who seem to adjudicate more than once on issues arising from the same cause of action. There must be finality in litigation and that justice to be done between the parties. That's why it is not competent for the court to revisit the same question arising between the same parties by reviewing a previous decision unless and until it meets the threshold of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. In the persuasive case of *Hoystead v Commissioner of Taxation* (1925) AC 155. The court made the following observations " In the opinion for their Lordships it is settled, first `that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgement upon a different assumption of fact, secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new view they may entertain of the law of the case, or new version which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle. Thirty, the same principle-namely, that of setting to rest rights of litigants, applies to the case where a point fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgement, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties rights to rest applies and estopped occurs. The court also in *Henderson v Henderson* (1843) 3 Hare 1000, 114-115 Sir James Wigram V-C stated: " In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time See also *Njangu Wambugu and another* Nairobi HCC No 2 2340 of 1991, *Siri Ram Kaura v MJE Morgan* CA 71/1960 (1961) EACA 462,

91. In my judgement there is no reason why the provisions of Section 7 of the CPA as articulated further in the above case law should not apply in Succession disputes. Indeed, there is every reason why it should being a salutary principle of law given the lethargic litigation landscape adopted by the parties occasioning inordinate delay with no compelling reasons to excuse or justify non conclusion of trials

under this branch of law. The invocation of this doctrine appropriately would avoid unnecessary proceedings involving expenses to the parties violation of human rights on inheritance, wastage of courts time and other resources which could be available to other needy cases. I consider it an abuse of the court process and contrary to public policy in the administration of justice if matters of succession expected to have been litigated in earlier proceedings should thereafter be allowed to proceed under review jurisdiction as premised in Section 80 of the *CPA* and order 45 Rule 1 of the *Civil Procedure Rules*. This doctrine properly applied by probate courts would prevent prolixity in litigation on disputes involving objection proceedings which sometimes derail confirmation of grant of letters of administration which is the basic instrument to guide the administration in resolving the dispute. I bear in mind nevertheless that there may be special circumstances in which on a case to case basis a probate court may find that justice of the matter demands non application of the doctrine of re-judicata.

92. The core of the doctrine is that a particular matter once settled by a judgement, decree, award or other determination like in succession disputes issuance of a Certificate of Confirmation of grant resolving the twin issues of identification of the beneficiaries and distribution of the Assets in consonant with Section 29 of the *Act* that ought to be regarded as final unless there are compelling reasons to invoke Section 76 of the same Act. In all other circumstances the same cause of action cannot be re-litigated again between the same persons bound by the decision.

93. The need for finality being of significance was precisely articulated by the learned author Andrews in reference ILA Interim Report pg 942 in which he was emphatic "without finality of decision, litigants and indeed the legal system as a whole would be exposed to many hazards: that a dispute might continue to drag on, greater legal expense and delay might result, scarce judge-time might be spent re-hearing the matter, inconsistent decisions might follow, litigation would cease to be a credible means of settling disputes , the victorious party in the first case would be deprived of the legitimate expectation that the first action would not be merely a dress rehearsal for further contests.

94. This matter qualifies for the court to invoke re-judicata for reasons that a judicial decisions have been rendered and pronounced by this court with jurisdiction over the parties on the same subject matter in inheritance rights. The certificate of confirmation of grant was final and conclusive on the merits for purposes of *res-judicata*. Looking at the dispute positively this court was invited to visit the intestate estate to have a panoramic view of what is bedevilling the transmission of the intestate estate. Accordingly, although there was no error of law it resolved by the parties in the presence of their legal counsels to subject any minute procedural or jurisdiction issue to court annexed mediation. This caution on the alternative forum was to be exercised in relation to practical consideration such as whether the issues which individual beneficiaries also dear close to their hearts would be fully ventilated so that the family can bring closure on sharing of the estate survived of the deceased. Unfortunately, the two knowledgeable and experienced mediators returned a verdict of non-settlement. The effects associated with this estate were once again lodged before the probate court and a determination on the merits was arrived at to avoid any further delay. In all the facts and circumstances necessary to give rise to a right to relief as advanced by the beneficiaries they continue relying on the same evidence to make up a cause of action to appear as if it is of a new character.

95. In my judgement I cant agree more to borrow the words coined by Lord Diplock L.J 1964 CA 181,197. In which he stated on the cause of action estoppel being that which prevents " cause of action estoppel is that which prevents a party to an action from asserting or denying, as against the other party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action as determined to exist i.e judgement was given upon it, it is said to be merged in the judgement, or for those who prefer latin, transit in

remjudicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does, he estopped per rem judicatam.

96. For those reasons I do exercise discretion and in determining the consolidated applications as guided by the provisions of order 42 rule 6(1),Order 45 Rule 1 of the *CPR*, Section 1(A), 1(B), 3(A) 7, & 80 of the *CPA* as read with rule 73(1) of the *Probate and Administration Rules* and further placing reliance on the jurisprudential principles in the authorities discussed above the following orders shall abide:

    a. The plea of res-judicata and estoppel prevents the re-litigation of substantive issues of fact and law which the prior decision from this court established the legal foundation for its conclusions.

    b. The application for leave to appeal is hereby Denied. The applicants have failed to demonstrate prima facie grounds that merit serious judicial consideration by the Court of Appeal.

    c. Consequently, the prayer for stay of execution is Denied. The court's distribution scheme, developed through extensive processes including surveyor reports, site visits, and mediation attempts, shall proceed without further delay.

    d. The application for review dated 30th January, 2025 is similarly dismissed for want of merit.

    e. The Certificate of Confirmation of Grant dated 15th November 2024 shall remain in force and be implemented in its entirety.

    f. Each party shall bear its own costs.

97. Orders accordingly

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF MARCH 2025.

.....

R. NYAKUNDI

JUDGE