



In re Estate of Kigen Arap Kurgat (Deceased) (Civil Appeal E007 of 2024) [2025] KEHC 2379 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E007 OF 2024
RN NYAKUNDI, J
MARCH 6, 2025**

IN THE MATTER OF THE ESTATE OF KIGEN ARAP KURGAT – (DECEASED)

BETWEEN

ELIZABETH JERUTO KIGEN APPELLANT

AND

MARY JERUTO KOSGEI RESPONDENT

AND

LEAH CHEMTAI KIGEN INTERESTED PARTY

ELIZABETH JEMUTAI TOWETT INTERESTED PARTY

ANNE KIGEN INTERESTED PARTY

RULING

1. The present matter comes before this court on appeal from the Chief Magistrate’s Court, raising questions about jurisdictional limitations and the proper administration of estates. The appellant filed summons dated 17th December, 2024 seeking reliefs as follows:
 - a. Spent
 - b. That in the interim the court be pleased to suspend and or stay implementation of certificate of confirmation of grant and all consequential orders including orders issued on 6th December, 2024 in Eldoret Chief Magistrate Court Succession Cause No. 167 of 2019 involving the estate of Kigen Arap Chepkurgat pending the hearing and determination of this application interparties.
 - c. That there be stay of implementation of certificate of confirmation of grant and or implementation of distribution proceedings including orders issued on 6th December, 2024



Eldoret Chief Magistrate court Succession Cause No. 167 of 2019 involving the estate of Kigen Arap Chepkurgat pending hearing and determination of this appeal.

- d. That costs be provided for.
2. The application is supported by an affidavit sworn by Elizabeth Jeruto Kigen and is anchored on grounds that:
 - a. On 4th June, 2024 the court issued a grant over the estate of Kigen A. Chepkurgat in favour of Mary Jeruto Kosgei.
 - b. Upon hearing parties by way of written submissions the court distributed the estate which properties included:
 - i. Kaptagat/lotonyok Block 2 (Koilel)/9 measuring 29 acres and or 11.82 acres valued at Kshs. 60 Million.
 - ii. Plot No. 30 at Koilel Trading Centre.
 - iii. Tembeleo/elgeyo Border/265 measuring 22 Acres
 - iv. Mosop/Kaptarakwa/283 measuring 22 Acres.
 - v. Mosop/Kaptarakwa/283 measuring 7.41 Acres or 3.06 Ha.
 - c. On 26th November, 2024, the applicant applied for stay of implementation of the grant and distribution of the estate and further sought that the confirmed grant be annulled and or revoked on the grounds that:
 - i. Land Parcel No. Tembeleo/elgeyo Border/265 which was included in the estate belongs to Charles Barmao Kigen and was the subject in Success Cause No. 243 of 2018 and thus cannot be devolved in the Estate of Kigen Arap Chepkurgat.
 - ii. The Grant and the Certificate of Confirmation of grant was issued by way of concealment of material facts and or material non-disclosure and or the process leading to grant was defective in the sense that the value of the estate is worth more than 60 Million which deprives the court presided by a Chief Magistrate of jurisdiction to entertain the matter.
3. In response to the application, the 2nd Interested party, Elizabeth Jemutai Towett deposed as follows in her replying affidavit sworn on 28th January, 2025:
 - a. That I am the daughter to the deceased herein hence the benefits allocated by the Court in Succ No. 167 of 2019 was rightfully allocated.
 - b. That the administrator and the Appellant are working hand in hand to ensure that justice is not served to the daughters of the deceased.
 - c. That I say so for the reason that the notice of change that was done by the Counsel for the Administrator was the account of the Counsel for the Appellant.
 - d. That in response of paragraph 5 of the supporting affidavit, it is indeed true that the Honourable Court issued orders to the effect that all the children of the deceased to get equal shares.



- e. That in response to paragraphs 6 and 7 of the supporting affidavit, having established the Appellant and the Administrator are working together, they are being dishonest for the reason that all along during the hearing of the matter they never raised an issue on jurisdiction.
 - f. That in response to paragraphs 9 and 10 of the supporting affidavit, the daughters of the deceased I being one of them are the ones aggrieved for the reason that they have been sidelined from utilizing the same.
 - g. That in response to paragraph 12 of the supporting affidavit, the appellant is raising an issue in relation to land parcel known as Tembeleo/Elgeyo Border/265. She has no issue with parcel known as Kaptagat/Lotonyok Block 2 (Koilel)/9.
 - h. That further to the above, Kaptagat/Lotonyok Block 2 (Koilel)/9 had already been subdivided equally to all the beneficiaries including the Appellant and the Administrator and as such the grant can be executed partially to allow us enjoy our father's properties.
 - i. That further to the above the use, occupation and possession of the suit property has been peaceful, uninterrupted until recently in the year 2022 when the Applicants began to lay claim of the property.
 - j. That in response to paragraphs 13 and 14 of the supporting affidavit, it is not true that if subdivision which has already been done and issuance of the titles to the beneficiaries will not cause any loss provided that the Court allocated beneficiaries equal shares pursuant to non-discriminatory principle as envisaged under Article 27 of *the Constitution*.
 - k. That the application before this Honourable Court is an abuse of the Court Process and as such it should be dismissed with costs.
 - l. That by the actions of the Appellant and the Administrator amounts to disinheriting the daughters of the deceased.
 - m. That it is in the interest of justice and fairness that the instant application be dismissed to enable the me enjoy my property as guaranteed by Article 40 of *the Constitution*.
4. The 1st interested party equally came in with a replying affidavit sworn on 20th February, 2023 in which she deposed as follows:
- a. That I confirm the properties of the estate as set out at paragraph 5 of the supporting affidavit of Elizabeth Jeruto Kigen.
 - b. That the Grant issued by the Honourable Magistrate was to the effect that all the properties of the estate be distributed equally among the beneficiaries.
 - c. That the Cause that is appealed from was filed by the Advocate for the respondent's husband one Pius Kigen.
 - d. That a Grant can only be revoked when it is disclosed that there was a material concealment of facts to court or the same was obtained by fraud.
 - e. That the trial court had ordered that all the properties of the estate be surveyed and thereafter be shared/distributed among the beneficiaries equally and hence there is nothing wrong done by the court.
 - f. That nobody is or will be deprived of his/her rightful share of land as alleged by the applicant.



- g. That the basis of the court's decision was the fact that all beneficiaries need to get equal shares.
5. Leah Chemtai Kigen also filed a further supporting affidavit, in which she deposed that there is a person called Amos Kosgei, son of Pius Kigen the petitioner herein Eldoret C.MC P&A No. 167 of 2019 Estate of Kigen Chepkurgat who has brought a tractor on L.R NO. Kaptagat/Lotonyok Block 2 (Koilel)/9 and has confirmed ploughing on our shares of the land.
 6. She stated that all the parcels of land involved in this Cause namely Kaptagat/Lotonyok Block 2 (Koilel)/9 (11.82 ha), Tembelio/ Elgeyo Border/265 (22 acres), Mosop/ Kaptarakwa/283 (3.06 ha) and Center plot (0.2 acres) all belong to the estate of Kigen Arap Chepkurgat, deceased. That the said Amos Kosgei needs to be stopped from ploughing the land while the rest of them are not ploughing because they are giving the court a chance to distribute the estate.
 7. The parties canvassed the application by way of written submissions, which I have endeavoured to highlight as hereunder:

Appellant's submissions

8. Learned counsel Mr. Korir submitted on behalf of the applicant, Elizabeth Jeruto Kigen, that the appellant has preferred an appeal against the orders issued by Hon. Areri on 16th December 2024. The magistrate had directed that survey proceed on the deceased's estate comprising land parcels No. Kaptagat Lotonyok Block 2 (koilel)/9, Plot No. 30 Koilel trading centre Tembeleo/Elgeyo Border/265 and Mosop/Kaptarakwa/283 in accordance with certificate of grant dated 6th September 2024.
9. Counsel argued that the appellant challenges this decision which was to set aside and/or vary orders of the same court. Mr. Korir informed the court that the appellant had previously applied to have the distribution proceedings stayed pending hearing of an application dated 26th November 2024 where interim orders of stay were granted.
10. In his submissions, learned counsel noted that the magistrate on 6th December 2024 directed the survey and/or distribution to proceed and be supervised by OCS, Naiberi police station, before the application dated 26th November 2024 could be heard. Consequently, the appellant preferred the appeal and sought to have the distribution suspended until the appeal is heard and determined.
11. Counsel submitted that the appellant has raised the following pertinent issues worth consideration:
 - a. That the learned magistrate ignored the fact that land parcel No. Tembeleo/Elgeyo Border/265 was the subject of succession cause No. 243 of 2018 which estate belongs to Charles Barmao Kigen and was thus not available for distribution in the estate of Kigen Arap Kurgat.
 - b. That the estate is valued at over 100 million as such the court presided over by a chief magistrate lacked jurisdiction to preside over the matter.
12. Learned counsel posited that the principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules. He relied on the provision on the strength that no appeal shall operate as a stay of execution except in so far as the court appealed from may order, but the appellate court may for sufficient cause order stay of execution.
13. In making his point, Mr. Korir emphasized that Order 42, rule 6 provides that no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant, the application has been made without unreasonable delay, and security has been given by the applicant.



14. The learned counsel argued that the appellant has demonstrated she will suffer substantial loss as the appeal would be rendered nugatory unless the orders sought are granted. In support of this argument, he presented eight points from the supporting and supplementary affidavits detailing why the stay should be granted. Including:
 - a. That unless stay of execution of the orders are granted, the applicant shall suffer substantial and or irreparable loss in the sense that it would be hard to re-organize parties once parties have assumed possession.
 - b. That some parties may acquire titles as a result of the orders made by the court and may proceed to dispose of such properties which would occasion the applicant substantial.
 - c. The subject of the appeal revolves the estate which is landed property as such execution of the ruling and resultant certificate of confirmation of grant would have for reaching implications considering that the court appointed surveyors and will involve alteration of the maps and ultimate subdivision of the land comprising the estate.
 - d. The activity will involve a lot of costs and undoing what the surveyor could have done would also involve colossal costs.
 - e. That there is also possibility that once subdivision has occurred some beneficiaries were settled on their parcels long before the deceased passed on and have constructed permanent homes.
 - f. That the applicant is also apprehensive that once new titles are issued the land might find its way into the hands of third parties.
 - g. That the learned magistrate erred in ordering distribution to continue despite pertinent issues having been raised touching on jurisdiction of the court not only on the pecuniary jurisdiction of the court but also on the issue of the court distributing land parcel No. Tembeleo/Elgeyo Border/265 in two different files.
 - h. That the intended appeal would be imminently rendered nugatory if status quo is not maintained until it is heard and determined.
15. In elaborating on the concept of nugatory, Mr. Korir cited the case of Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others, where the court stated that "nugatory" must be given its full meaning, not only worthless, futile or invalid, but also trifling, and that whether an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible or if damages will reasonably compensate the aggrieved party.
16. Counsel argued that unless stay is granted, the certificate of confirmation of grant would be implemented, rendering the appeal an academic exercise. Mr. Korir submitted that the appellant has demonstrated sufficient cause to warrant stay of the implementation of the magistrate's court certificate of confirmation of grant.
17. In concluding his submissions, learned counsel noted that the appellant has annexed a valuation report showing one of the properties is valued at Ksh 60 Million, which essentially deprives the Magistrate's court jurisdiction. Mr. Korir posited that the issue of jurisdiction can be raised at any time, even on appeal, and invited the court to be guided by the Court of Appeal decision in Kenya Ports Authority Vs Modern Holding (EA) Limited 2017 eKLR.



2nd Interested Party's submissions

18. Learned counsel Ms. Monda submitted on behalf of the interested party, Elizabeth Jemutai Towett, in response to the instant application. She noted that the interested party opposed the application and filed a replying affidavit sworn on 28th January 2025. Learned counsel highlighted that the Plaintiff had failed to serve her submissions as directed by the Honourable Court despite the urgency of the matter.
19. In addressing the issues for determination, counsel Ms. Monda argued that the main question was whether the estate of the deceased was distributed fairly. She emphasized that it is not in dispute that the beneficiaries who were allocated shares in relation to the estate of the deceased are his children. Counsel submitted that the Appellant's only complaints relate to the pecuniary jurisdiction of the estate and the inclusion of land parcel Tembeleo/Elgeyo Border/265, which has allegedly been subdivided in the estate of the late Charles Barmao Kigen, son of the deceased.
20. On the jurisdiction issue, learned counsel Ms. Monda contended that at the time of filing the suit, the Petitioner did not disclose that the subject value was over 20 Million shillings, and no valuation report was provided at that time. She further argued that this issue was never raised during hearings since 2018. Counsel submitted that as stated in their replying affidavit, the Appellant is connected to the Petitioner, and they have demonstrated that the same Counsel filed their documents.
21. Ms. Monda posited that the Petitioner through the Appellant are in cahoots to disinherit the interested party merely because she is the daughter of the deceased. In support of her argument, counsel cited Article 27 of *the constitution*, which provides for equality and freedom from discrimination. Specifically, Ms. Monda quoted Article 27(1) stating "Every person is equal before the law and has the right to equal protection and equal benefit of the law" and Article 27(3) providing that "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."
22. Learned counsel observed that the Appellant has not objected to the mode of distribution by the Law Court and noted that the grant has already been executed in relation to parcel known as Kaptagat/Lotonyok Block 2 (Koilel)/9 whereby the land surveyor has distributed equal shares to all beneficiaries.
23. In supporting her argument for fair distribution, Ms. Monda cited the case of Estate of Ainea Masinde Walubengo (deceased) (2017) eKLR, where the court stated:

"I am of the view that Section 40 of the *Law of Succession Act* will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow."
24. In conclusion, Ms. Monda submitted that it has been established that the Court distributed the properties to all beneficiaries equally without discriminating against anyone. Consequently, she urged that the appeal and the application by the appellant be dismissed with costs.

Analysis and determination

25. I have carefully considered the application before me, the grounds and affidavits presented both in support and opposition, together with the respective submissions advanced by learned counsel. The central issue for determination is whether the appellant has established sufficient grounds warranting the stay of implementation of the certificate of confirmation of grant as sought. This determination must be made against the significant contention that the estate in question is valued at more than Kshs.



- 100 million, a matter which potentially exceeds the pecuniary jurisdiction of the magistracy and raises fundamental questions regarding the validity of the proceedings in the lower court.
26. While it is a settled principle of law that the issue of jurisdiction may be raised at any stage of proceedings, including on appeal, the Court must be cognizant of the manner and timing in which such objections are raised. The judicial system operates within the constraints of finite resources, and courts must balance the technical requirements of the law with the practical demands of judicial economy. It is noteworthy that the Appellant appears to have participated in the proceedings before the lower court without raising jurisdictional concerns until after the distribution of the estate had been substantially advanced.
27. The practice of withholding jurisdictional objections until an unfavourable outcome emerges raises legitimate concerns about the efficient utilization of judicial resources. Legal practitioners bear a professional responsibility to conduct due diligence at the outset of proceedings, which includes a thorough assessment of jurisdictional parameters. I emphasize that while jurisdiction can be raised at any time, I am of the considered view that courts must be vigilant against tactical manoeuvres that unnecessarily prolong litigation and drain judicial resources.
28. Nevertheless, the fundamental nature of jurisdiction to judicial proceedings cannot be subordinated to considerations of procedural convenience. If indeed the value of the estate substantially exceeds the pecuniary limits prescribed for Chief Magistrates, this Court must give due regard to that contention. The determination of this issue will require careful examination of the evidence presented regarding the estate's valuation, particularly the recently annexed valuation report indicating that one property alone is valued at Kshs. 60 million.
29. As was stated in *The Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd* [1989] KLR 1, it would be an act in vain for a Court to hear and determine a matter if it lacks the jurisdiction to do so. In the said case, the Court of Appeal guided as follows: I am persuaded that the Applicant's position is correct in law. "Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not posse, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given .
30. Similarly, in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held as follows:
- "A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits.



It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

31. In the same strength the court in *Joseph Kamau & Another vs David Mwangi* (2013) eKLR was emphatic on the issue of jurisdiction. " When a suit has been filed in a court without jurisdiction, it is a nullity, many cases have established that, the most famous being *Kangenyi v Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction. We hold that jurisdiction cannot be conferred at the time of delivery of judgement, jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filling suit or latest at the commencement of hearing.
32. The constitutional architecture of Kenya's judicial system establishes a hierarchical structure wherein the Subordinate Courts, including Magistrates' Courts, derive their authority from Article 169 of *the Constitution* of Kenya, 2010. Pertinent to the matter before this Court is the question of pecuniary jurisdiction, the monetary threshold that determines which cases fall within the ambit of different judicial officers. The Magistrates' Courts Act delineates these parameters with precision in Section 7(1), which stipulates:

" A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

 - (a) Twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) Fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) Ten million shillings, where the court is presided over by a principal magistrate;
 - (d) Seven million shillings, where the court is presided over by senior principal magistrate; or
 - (e) Five million shillings, where the court is presided over by a resident magistrate."
33. Before even one talks of stay of execution of the certificate of confirmation of grant issued by the Chief Magistrate's Court in Succession Cause 243/2008 the million dollar question is whether that legal instrument can be said to have been processed by a court clothed with jurisdiction. The answer to this question is traceable to the affidavit evidence filed by the Applicants which asserts inter-alia that the estate in question was far beyond the pecuniary jurisdiction of the Senior Principal Magistrate who at a time was seized of the subject matter to deal with identification of beneficiaries and the fee estate of the deceased.
34. Essentially this means even at an opportune time, the issue of the proceedings initiated and culminating into the final decree of the court in the form of certificate of confirmation of grant can be sustainable as a legal instrument capable of transmitting the estate in view of the court lacking the pre-requisite jurisdiction.
35. The law of succession both in the letter and the spirit is very strict on the qualitative approach and compliance with the law on all matters of inheritance. This is one branch of law where the values and principles of governance of inclusivity and participation in Article 10 of *the constitution* reign supreme and is non negotiable by any decision maker exercising jurisdiction pursuant to Article 50 (1) of *the*



constitution. The co-provisions of the succession Act relevant for our discussion is Section 76 which provides inter-alia: “ A grant of presentation, whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion:-

- a. That the proceedings to obtain the grant were defective in substance
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently

36. One of the major grounds cited by the Applicant in the intended Memorandum of Appeal is that the court lacked pecuniary jurisdiction to continue with the matter. That some properties being included in the estate do not or did not belong to the estate. In essence from the material placed before the court in the 1st instance the pecuniary jurisdiction of the intestate estate far exceeds what the magistrate’s court Act stipulates for the holder of an office of a Senior Principal Magistrate. By dint of the authorities cited above the learned trial magistrate was misled by the petitioners who concealed material evidence on the value of the intestate estate which was far beyond the forum presided over by a Senior Principal Magistrate. In the circumstances the proceedings to obtain the certificate of confirmation of grant was defective in substance for want of the Jurisdiction of the court.
37. Having had the advantage of reading the entire record in Succession Cause No. 167/2019 and 243/2018. The learned trial magistrate lacked jurisdiction to entertain the petitioners claim on inheritance rights. I take judicial notice that jurisdiction of a court is determined by the Plaintiff’s claim or pleadings which give rise to the final reliefs or declarations being sought at the end of the trial, but such statement of claim or petition may be misleading for reasons of non-disclosure of material facts or misrepresentation for reasons better known to the claimant/petitioner. In the case at bar, the statute which creates the magistrate’s court has vested jurisdiction on the various ranks of the magistrates for procedural and substantive orderliness in the administration of justice. In our legal system it is no longer debatable that courts are creatures of constitution and the enabling statutes going further to define their areas of jurisdiction. A court of law or a tribunal for that matter must possess the necessary vires to try and embark on adjudication of any cause or matter within the framework of Article 50 (1) of the constitution. Jurisdiction is the life wire to any adjudicatory powers of any Court or Tribunal. The comparative case of National Union of Transport Workers and Another vs Road Transport Employers Association of Nigeria (2012 LPELP 7840). The Supreme Court dictum is relevant to this matter where the following words are consistent with our legal heritage on jurisdiction. Thus “it is the wire of a case which should be determined at the earliest opportunity. If a court has no jurisdiction to determine a case, the proceedings remain a nullity ab initio no matter how well conducted and decided, this is so since a defect in the competence is not only intrinsic to the entire process of adjudication”
38. Flowing from foregoing decisions, and aligning them with the litigation history of the succession Cause No. 243/2018 & 167/2019 the interpretation and application of the law on jurisdiction with respect to matters relating to or incidental to the inheritance rights touching on the intestate estate remain questionable for the trial court acted in excess of jurisdiction. The proceedings leading to the certificate of confirmation of grant remain fatally defective for want of jurisdiction. By virtue of the Application of the law sadly so the petitioners must move the court denovo before a forum clothed with jurisdiction.
39. Having carefully navigated these preliminary considerations, I must now assess whether the appellant has satisfied the threshold requirements for the grant of stay of execution as sought. Order 42 Rule 6 of the Civil Procedure Rules stipulates three essential conditions that must be met: first, that substantial



loss may result to the applicant unless the order is made; second, that the application has been made without unreasonable delay; and third, that such security as the court orders for the due performance of the decree or order as may ultimately be binding on the appellant has been given.

40. It is trite law that applications for stay of execution are governed by Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

41. Courts have severally held that the power to grant an order of stay pending appeal is discretionary as was observed by the Court of Appeal in *RWW v EKW* (2019) eKLR that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

42. With respect to the first condition, the appellant has outlined several grounds upon which she contends substantial loss may occur. These include the practical difficulty of reorganizing possession once beneficiaries have taken possession of their allocated shares, the possibility of titles being issued and subsequent transfers to third parties, the costs associated with surveying and potential reversal of subdivision, and the challenges that may arise where beneficiaries have already established permanent structures on the land.



43. The Court of Appeal in *Absalom Dova v Tarbo Transporters* (2013) eKLR stated that:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
44. In the present case, I am satisfied that the implementation of the certificate of confirmation of grant, particularly in relation to the subdivision and potential transfer of land, could render the appeal substantially nugatory if the appellant's jurisdictional challenge were to ultimately succeed.
45. Regarding the second condition, I note that the application was filed on 17th December, 2024, shortly after the impugned orders were issued on 6th December, 2024. I am therefore satisfied that the application has been made without unreasonable delay.
46. As to the third condition concerning security, I observe that the appellant has not offered any security for the due performance of any decree that may ultimately be binding. However, given the nature of the dispute, which centers on the distribution of a deceased's estate among family members, I consider it appropriate to exercise discretion in this regard. The requirement for security may be dispensed with where the circumstances so warrant, particularly in succession matters where the purpose of the stay is to preserve the estate pending determination of substantive issues.
47. Upon careful reflection, the Court is confronted with a fundamental jurisdictional question that cannot be overlooked despite its late introduction. The appellant has provided a valuation report indicating that just one property within the estate is valued at approximately Kshs. 60 million, which alone exceeds the Chief Magistrate's pecuniary jurisdiction of Kshs. 20 million as established under Section 7(1)(a) of the Magistrates' Courts Act. When considering the cumulative value of all properties comprising the estate, which potentially exceeds Kshs. 100 million according to the appellant's contention, the jurisdictional defect is not merely technical but goes to the very root of the proceedings.
48. The law on jurisdiction is settled. Where a court acts without jurisdiction, its proceedings and resultant orders are a nullity ab initio. In *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court of Appeal emphatically stated that "jurisdiction is everything" and that a court must "down tools" the moment it realizes it lacks jurisdiction. This Court cannot, in good conscience, merely stay execution of orders issued by a court that fundamentally lacked the authority to issue them in the first place.
49. The valuation report now before this Court constitutes prima facie evidence that the Chief Magistrate's Court lacked pecuniary jurisdiction to entertain the succession cause. While I have expressed concern about the delayed raising of this jurisdictional objection, that concern cannot override the fundamental principle that jurisdictional defects render proceedings void regardless of when they are discovered. As the Supreme Court observed in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* (supra), a court cannot "arrogate to itself jurisdiction exceeding that which is conferred by law."
50. Having found that the Chief Magistrate's Court lacked jurisdiction to entertain Succession Cause No. 167 of 2019 given the value of the estate, I am compelled to declare those proceedings a nullity. In



the interests of justice and to avoid further delay in the administration of this estate, I direct that the succession cause be properly instituted in the High Court, which possesses the requisite pecuniary jurisdiction to entertain matters of this value.

51. In conclusion, while I understand the parties' desire for finality in this long-running succession dispute, the fundamental defect in jurisdiction cannot be cured by mere acquiescence or the passage of time. The juridical integrity of our court system demands meticulous adherence to prescribed jurisdictional parameters, particularly where substantial assets hang in the balance. The High Court is better positioned to ensure that the distribution of this estate proceeds in accordance with the law while respecting the constitutional rights of all beneficiaries.
52. Consequently, the following orders do issue:
- a. The application dated 17th December, 2024 is Allowed.
 - b. The proceedings in Eldoret Chief Magistrate Court Succession Cause No. 167 of 2019 & 243/2018 in respect of the estate of Kigen Arap Chepkurgat (deceased) are hereby declared a nullity for want of pecuniary jurisdiction.
 - c. The Certificate of Confirmation of Grant issued on 6th December, 2024 in the said succession cause, together with all consequential and enabling orders, are hereby SET ASIDE.
 - d. The succession Cause No. 167 of 2019. & 243/2018 from the Chief Magistrate's Court shall be withdraw and fresh succession proceedings be instituted in the High Court within thirty (30) days from the date of this ruling before Hon. Ominde J.
 - e. For the avoidance of doubt, the status quo regarding occupation, use, and possession of all properties comprising the estate shall be maintained as it existed prior to the commencement of the nullified proceedings, with no party permitted to alter, transfer, dispose of, or materially change any portion of the said properties pending the proper determination of succession rights by the High Court.
 - f. That the intended Appeal pursuant to Section 1(A), 1(B), & 3(A) of the Civil Procedure Act as read with Section 76 of the Law of Succession Act and Rule 73(1) of the Probate and Administration Rules be and is hereby compromised on the judicially settled principles on jurisdiction.
 - g. That each party be at liberty to apply.
 - h. The costs of this application shall be in the succession cause.

53. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 6TH DAY OF MARCH, 2025

.....
R. NYAKUNDI

JUDGE

