



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Wilson Cherop (Deceased) (Succession Cause  
300 of 2007) [2025] KEHC 5919 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 300 OF 2007**

**E OMINDE, J**

**MAY 7, 2025**

**N THE MATTER OF THE ESTATE OF WILSON CHEROP**

**BETWEEN**

**PERIS JEPKEMBOI KIMUTAI ..... 1<sup>ST</sup> PETITIONER**

**ISAAC KIBIWOT CHEROP ..... 2<sup>ND</sup> PETITIONER**

**FRANCIS KIPSANG KIMUTAI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SOLOMON KIPSANG KIPTARUS ..... OBJECTOR**

**RULING**

1. What is pending before this court is the applicants' Chamber Summons dated 06/03/2024 seeking the following orders;
  - a. Spent
  - b. That leave be granted to the petitioners to file an appeal to the court of Appeal against the judgement of this court dated 16<sup>th</sup> day of February, 2024.
  - c. P.T.O
  - d. That costs of the application be in the cause.
2. The application is premised on the grounds set out on the face of it and the contents of the supporting affidavit to the application, sworn by the 2<sup>nd</sup> Petitioner. In his affidavit, the deponent averred that he is an administrator to the estate of the estate of the deceased and that being dissatisfied with whole of the judgement on 16/02/2024 he intends to Appeal and has filed a Notice of Appeal which he annexed to the affidavit. He prayed the Court grant him leave to file an Appeal to the Court of Appeal against whole of the judgement. Further, that the court do grant leave to the firm of Tarus & Company



Advocates to come on record on his behalf. He stated that he stands to suffer substantial loss and damages should the orders not be granted.

### **Replying Affidavit**

3. The Objector opposed the application vide a Replying Affidavit dated 01/10/2024. He averred that the application lacks merit, is in bad faith and should be disregarded by this honourable court. Further, that it is only meant to delay and deny him justice, having obtained judgement in his favour. He averred that the Applicants have not demonstrated that they are deserving of the orders sought, pointing out that there is no draft appeal attached for consideration on whether or not the Applicants have a likelihood to succeed with any intended appeal. He urged that it is therefore prejudicial if the court will go ahead and grant orders of stay pending appeal, which appeal remains only in the mind of the Applicants. Further, that the Applicants have not offered an explanation for the delay to file the appeal within stipulated time, and the court is left to guess on whether or not the delay is reasonable. He stated that as much as the power of the court to extend time is discretionary in nature, such discretion must be exercised judiciously and not capriciously. He reiterated that for an application for extension of time have a duty to demonstrate to the satisfaction of the court the reason for delay, and further, that extension of time is not a right, but an equitable remedy only available to a deserving party. He urged the court to dismiss the application with costs.

### **Applicants Further Affidavit**

4. The applicant filed a further affidavit dated 18/12/2024. He reiterated his desire to appeal against the judgement to the Court of Appeal. He stated that upon the delivery of the said judgment, he moved with speed with his co-petitioners and filed a Notice of Appeal on 1<sup>st</sup> March 2024 and the instant application on 18<sup>th</sup> March 2024 seeking for leave of Court to appeal against the judgment. He averred that it is therefore not true as alleged by the Respondent in his Relying Affidavit that he is seeking for extension of time to file an appeal out of time since in succession matters leave to appeal is a prerequisite before filing an appeal.
5. He further stated that he has an arguable appeal with high chances of success that merit serious judicial consideration by the Court of appeal. He urged that Article 164(3) of *the Constitution* confers direct jurisdiction in the Court of Appeal to hear appeals from the High Court hence it is in the interests of justice that this application be allowed. He reiterated that he would suffer prejudice if the instant application is not allowed and further, that the intended appeal stands to be rendered nugatory if this Honourable Court does not grant an order of stay of execution of its judgment pending the hearing and determination of the pending appeal.

### **Hearing of the application**

6. The petitioner filed submissions dated 15/01/2025. The respondents were granted an opportunity to file their submissions but opted not to file submissions and rely on the replying affidavit.

### **Applicants' Submissions**

7. Counsel urged that they have demonstrated on a prima facie basis that there are grounds which merit serious judicial consideration by the Court of Appeal. He cited the case of Rhoda Wairimu Karanja & another vs Mary Wangui Karanja & another [2014] eKLR where the Court of Appeal held that;

I 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 merit serious judicial consideration.

8. Counsel urged that the draft memorandum of appeal which is annexed to the Petitioners'/ Respondents' further affidavit raises substantive grounds which merit serious judicial consideration by the Court of Appeal. Further, that the Objector/Respondent will not suffer any prejudice if this application is allowed since he too will have a chance to be heard in the court of appeal. He cited the case of *Re Estate of Joel Thara Ruria (Deceased)* [2022] eKLR in this regard.
9. Counsel urged that Article 164 (3) (a) of *the Constitution* and Section 3A of the *Appellate Jurisdiction Act* donates jurisdiction to the Court of Appeal to hear and determine appeals from the decisions of the High Court. On the basis of the foregoing submissions, counsel urged that the applicants have established grounds to merit serious judicial consideration by the Court of Appeal.
10. Counsel urged that it is their humble prayer that this court grants an order of stay of execution of the judgment in order to preserve the subject matter of this cause pending the hearing and determination of the intended appeal. He urged the court to find the application merited and allow it with costs.
11. Counsel for the Respondent stated that they will rely entirely on their Replying Affidavit and would therefore not file any submissions.

#### **Analysis & Determination**

12. Section 50 of the *Law of Succession Act* Cap 160 Laws of Kenya provides as follows: -

- “(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court shall be final.
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

13. I have considered the Application in its entirety. I am satisfied that it does have merit and I therefore allow it in its entirety. The Applicant is to bear the costs of the Application. In the circumstances, the Judgement of this Court delivered on 16<sup>th</sup> February 2024 is now hereby stayed pending the hearing and determination of the Appeal.

READ DATED AND SIGNED AT ELDORET ON 7<sup>TH</sup> MAY 2025

E.OMINDE JUDGE

