

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE AND ADMINISTRATION CAUSE NO. E075 OF 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE MOHAMMED AHMED ALI**

**BETWEEN**

**SOFIA ALI.....1<sup>ST</sup> APPLICANT**  
**FARIDA ALI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**TRUPHENA TAPEN KUKO.....1<sup>ST</sup> RESPONDENT**  
**LEILA MOHAMED ALI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. I delivered a Ruling in this matter in which I described the parties at paragraph 3 thereof in the following terms:

*“3. In the Petition, filed through Messrs Daniel Orenge & Co. Advocates, the said Susan Robinson was described as a former wife and the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and the 2<sup>nd</sup> Respondent were all described as daughters of the deceased. According to the Chief’s letter, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were the daughters of the 1<sup>st</sup> wife (described as a former wife), Susan Chepkurgat Robinson, while the 2<sup>nd</sup> Respondent as the daughter of the 2<sup>nd</sup> wife, the 1<sup>st</sup> Respondent herein. In short therefore, the Applicants are from the 1<sup>st</sup> house and the Respondents are from the 2<sup>nd</sup> house.*

2. The parties are the 4 joint Administrators of the estate of the late **Mohammed Ahmed Ali** (hereinafter described as “*the deceased*”), the subject of this Cause. The estate comprises of the two parcels land known as **Kitale Milimani L.R. No. 2116/XVI/90** and **Eldoret Municipality Block 5/221**.
3. On 12/02/2020, **H. Omondi J (as she then was)**, delivered a Judgment in **Eldoret High Court Citation Cause No. 45 of 2017**, the proceedings that preceded the commencement of this Cause, whereof she made declarations regarding the shares of the estate due to the beneficiaries. The Respondents seem not to have been impressed with the decision. The Applicants, then, on the basis that the Respondents had failed to co-operate by signing their part of the Summons for Confirmation of Grant for distribution of the estate as had been directed by **H. Omondi J**, filed an Application seeking, *inter alia*, Revocation or annulment

of the Grant of Letters of Administration and/or removal of the Respondents as co-Administrators.

4. By my Ruling dated 7/06/2024, I dismissed the prayer for Revocation of the Grant but allowed the prayer seeking that the Summons for Confirmation of Grant do proceed for Confirmation of Grant. I also gave the Respondents the liberty to file their own proposed mode of distribution upon which the Court would make a determination.
5. The Respondents having failed to file any proposed mode of distribution as directed in my Ruling above, the matter proceeded to hearing of the Summons for Confirmation of Grant which I allowed on 25/10/2024, and thus distributed the estate in terms of the declarations made by **H. Omondi J (as she then was)**, as proposed by the Applicant. Although the Respondents' Counsel, **Ms. Awuor**, holding brief for **Mr. Sala** was present in Court during the hearing of the Summons of Confirmation of Grant, the Respondents themselves did not appear. After confirming the Grant, I accordingly then closed the file.
6. The Applicants have now returned to Court with the Chamber Summons dated 30/01/2025 filed through their Advocates, **Messrs Daniel Orenge & Co.** It seeks orders as follows:
  - i) **THAT** the Confirmed Grant issued on the 23<sup>rd</sup> October 2024 be rectified that subject property **L.R. No. 2116/XVI/90** already distributed to all the beneficiaries herein be sold subject to a valuation by a Government Valuer and the valuation report be filed before Court within 21 days from the date of the Order.
  - ii) **THAT** the OCS, Kitale Police Station to provide security to the Government Valuer while enforcing Order No. 1 above to wit; **Truphena Tapen** to give access to the said property.
  - iii) **THAT** after the said valuation, the property **L.R. No. 2116/XVI/90** to be subjected to a sale and the proceeds of sale to be handled by the respective Counsels and be shared as per the Confirmed Grant issued by the Honourable Court on the 25<sup>th</sup> October 2024.
  - iv) **THAT Truphena Tapen** shall vacate from the property **L.R. No. 2116/XVI/90** within 30 days from the date of valuation or forcefully be evicted with the assistance of the OCS, Kitale Police Station to pave way for the intended sale.
  - v) **THAT Truphena Tapen** shall do account for the rental income she has received since 2016 to date and which sum shall be deducted from her share in the proceeds of the sale.

- vi) **THAT** such other fair relief this Honourable Court may deem fair and to grant.
7. The Application is expressed to be brought pursuant to **Section 74** of the **Law of Succession Act**, and **Rule 73** of the **Probate and Administration Rules**. It is then premised on the grounds stated on the face thereof, and is supported by the Affidavit sworn by the 1<sup>st</sup> Applicant, **Sofia Mohammed Ali**.
8. In the Affidavit, the 1<sup>st</sup> Applicant deponed that all along, before the commencement, and during the proceedings herein, the 1<sup>st</sup> Respondent has collected rent from the property **L.R. No. 2116/XVI/90**, and has benefited therefrom to the detriment of other beneficiaries, that the 1<sup>st</sup> Respondent's conduct of refusing and/or declining to participate in the Confirmation of the Grant hearing demonstrates that she is not willing to allow other beneficiaries to enjoy shares, and that the only way in which the Applicants can access their shares is through subjecting the same to a sale, and the proceeds to be shared amongst the beneficiaries. In the end, she deponed that the Respondents lodged an Appeal at the Court of Appeal but lost, and there is no other legal channel available other than selling the property.
9. The Summons is opposed vide the Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 13/03/2025 and filed through her Advocates, **Messrs Sala & Mudany**. In the Affidavit, the 1<sup>st</sup> Respondent denied that she has rented out the whole property **L.R. No. 2116/XVI/90** and contended that the same is her matrimonial home, being the only surviving widow of the deceased, and she stays in the property with her family. She deponed that one of the houses in the compound was rented out by the deceased prior to his death from which he used to receive rent of Kshs 40,000/-, and that it is the same house that is still rented out. She urged further that the rent is used to maintain the property, pay the caretaker, gardeners, watchmen, housekeeper, water and electricity bills, land rates and rent, and to maintain the main house, including catering for expenses such as for plumbing, electrical and painting. She further deponed that the rent is also used to maintain the children of the deceased who are still minors, such as paying for their school fees, hostel, rent, food, pocket money, and transport to college, among others. She contended that the amount of Kshs 40,000/- collected in rent is not even enough to cater for the expenses mentioned above and she is forced to dig into her pocket to sustain the same. She averred that the Applicants have never contributed a cent to maintain the property since the deceased died, and that if they are adamant on claiming the amount collected in rent, she, too, will be compelled to also claim the amount she has spent in maintaining the property since the deceased died. She however stated that she has no

problem with the valuation of the property by a Government valuer, on the condition that both the Judiciary valuers and the parties' own valuers are present.

10. She then stated that she wished to bring it to the Court's attention that the Respondents have appealed against the decision of **H. Omondi J** giving a former wife 30 per cent while she (1<sup>st</sup> Respondent) the only widow, is to get only 8 per cent. She refuted the Applicants' assertion that the Appeal was dismissed and contended that the same is yet to be heard. She wondered why the Applicants were in a hurry to have the assets sold before the appeal is heard. She then prayed that if the Court shall order sale of the property, then the proceeds thereof be kept by the Court in an interest earning account pending the outcome of the Appeal since once distributed, recovering the amount shall be unattainable as the Applicants are young people of straw. She opposed the Applicants' proposal that she vacates the property 3 days after valuation terming it as not practical and that if she has to vacate, then it should be after a buyer has been identified and has paid a decent portion of the purchase price as deposit. She argued that in today's economy, it may take years before one gets a buyer and she wondered who will maintain the property after she has been kicked out. She then listed the expenses she claimed to have incurred in maintaining and running the property since the demise of the deceased, which she aggregated at the sum of Kshs 157,000/-
11. With leave of the Court, the 1<sup>st</sup> Respondent filed the Supplementary Replying Affidavit which she swore on 10/03/2025. In the Affidavit, she stated that the deceased had rented out a house in the compound to pay off a loan that he had taken from Co-Operative Bank and charged to the property, which loan repayment went on until 2018 after the deceased had died. She then attached copies of the repayment schedule and deponed that she used the rental income to prevent the property from being auctioned to settle the unpaid loan. She then reiterated matters already contained in her Replying Affidavit. This was however in breach of the conditions I imposed when granting leave to file the Supplementary Affidavit. She then in total, exhibited almost 100 pages of alleged papers, receipts and Mpesa messages to demonstrate the expenses she has incurred in maintaining the property and in catering for the children.
12. The Application was then canvassed by way of written Submissions. The Applicants filed the Submissions dated 29/03/2025 while the Respondents' is dated 20/03/2025.

### **Applicants' Submissions**

13. The Applicant's Counsel, in response to the Respondents' contention that they have filed an Appeal, contended that the mere filing of an Appeal does not in itself operate as a stay of execution, and that there being no stay orders issued by the Court of Appeal, the Respondent
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cannot rely on the Appeal as a bar to the Application. In respect to the Court's powers on Rectification of a Grant on account of errors or omissions that hinder fair administration of the estate, he cited the case of **Re Estate of Gitere Kahura (Deceased) [2019] eKLR**.

14. He urged that the Rectification sought is necessary to ensure equitable distribution among beneficiaries, in line with the provisions of **Section 83(f)** of the **Law of Succession Act**, which mandates Administrators to complete distribution of the estate without unreasonable delay. In respect to the 1<sup>st</sup> Respondent's continued collection of rent without sharing the proceeds, Counsel cited the case of **Re Estate of James Ngugi Mbugua (Deceased) [2018] eKLR**, and urged that the 1<sup>st</sup> Respondent's conduct denies the other beneficiaries their rightful inheritance and constitutes unjust enrichment.

### **Respondents' Submissions**

15. The Respondents' Counsel, on his part, termed the Application incompetent as it seeks to pre-empt the distribution of the estate while an Appeal is pending. He cited the case of **Re Estate of G.K.K (Deceased) [2013]**, in which, according to him, it was held that a Succession matter cannot be determined piecemeal before distribution is done. He also submitted that the 1<sup>st</sup> Respondent is the legally recognized widow of the deceased and has been residing in the property since the death of the deceased and evicting her before the estate is distributed will be unjust and contrary to the principles of inheritance under Kenyan law. He cited the case of **Re Esttae of M'Ngarithi M'Miriti (Deceased) [2017] eKLR**. In respect to the 1<sup>st</sup> Respondent's claim that she has been maintaining the property and that such expenditure should be accounted for, Counsel cited the case of **Re Estate of Njoroge (Deceased) [2018] eKLR**. He urged that where a dispute over distribution is pending, all transactions must be put on hold until resolution thereof. He then restated that the 1<sup>st</sup> Respondent is not opposed to the valuation of the property but reiterated the conditions that the same must be conducted by a judicial valuer and each party's private valuer, and the cost shared equally, and that the 1<sup>st</sup> Respondent should not be evicted before a buyer is identified and pays a deposit. In conclusion, he urged that the Application should be dismissed for being premature, and urged that the Court should grant an order maintaining the property until the estate is properly distributed. He also asked the Court to declare that the rental income collected is justifiably used for the maintenance of the property and the children of the deceased. He also reiterated the proposal that if the property is to be sold, the proceeds should be held by the Court in an interest earning account pending the outcome of the Appeal.

### **Determination**

16. The issue that arises for determination herein is **“whether the confirmed Grant herein should be rectified by providing that the parcel of land known as L.R. No. 2116/XVI/90 be sold and the proceeds thereof shared among the beneficiaries in accordance with the proportions already allocated in the Certificate of Confirmation of Grant”**.
17. The Respondent’s main opposition to the Application is on the basis that they have lodged an Appeal challenging the decision of **H. Omondi (as she then was)** made in **Eldoret High Court Citation Cause No. 45 of 2017** on 12/02/2020, whereof she made declarations on how the estate was to be shared out among the beneficiaries, and which declarations this Court followed and applied in subsequently distributing the estate. According to the Respondents, the Appeal is pending before the Court of Appeal and this Application is therefore premature. The Respondents do not however allege that there is any stay of execution against the decision of **H. Omondi J (as she then was)**.
18. On the issue of stay pending Appeal, at paragraph 27 of my said Ruling dated 7/06/2024, I observed as follows:

*“27. Granted, the Respondents submit that they filed an Appeal challenging the said Ruling of Omondi J together with an Application for stay of proceedings and which are awaiting hearing and determination before the Court of Appeal. In support of this contention, the Respondents have only exhibited a copy of the Notice of Appeal dated 12/02/2020. Although they have indicated the Appeal to be Eldoret Court of Appeal Case No. 22 of 2021, they have not exhibited a copy of the Memorandum of Appeal or any other pleading or document to enable this Court scrutinize the same. Further, the alleged Application for stay of proceedings has not been exhibited and neither has even the Application number disclosed.”*

19. In their Replying Affidavit filed in response to the instant Application, the Respondents have again not exhibited a copy of the Memorandum of Appeal, or of any other pleading filed in the alleged Appeal to enable this Court scrutinize the same and reach a conclusion, and neither have they exhibited a copy of any Application for stay of proceedings nor even disclosed the Application number. In fact, this repeated avoidance to exhibit the Appeal pleadings, if any, compels me to wonder whether there is something damaging inside those pleadings which the Respondents presume may be prejudicial to their case. I do not know.
20. Regarding the issue of stay of execution, at paragraph 28 and 29 of the Ruling, I further stated as follows:

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**“28. In any case, the Applicants have in their Supplementary Affidavit, exhibited a copy of the subsequent Ruling delivered in the same Eldoret High Court Citation Cause No. 45 of 2017 on 30/04/2021 whereof Hon. Omondi J dismissed the Respondents’ Application for stay of execution “and any consequential actions flowing from the judgment of the High Court made on 12<sup>th</sup> February 2020 entirely pending the hearing and determination of the Appeal filed by the Applicant”. In the circumstances, issues of stay appear to have already been determined by this Court.**

**“29. Coincidentally, while carrying out my research, I have also come across a recent decision of the Court of Appeal delivered on 22/03/2024 in Court of Appeal Civil Application No. E023 OF 2023 and reported as *Kuko & Another v Ali & Another; Robinson (Interested Party) (Civil Application E023 of 2023) [2024] KECA 305 (KLR) (22 March 2024) (Ruling)*. The same dismissed an Application for stay of execution. Looking at the decision, it is clear that it is the Court of Appeal’s verdict on the Respondents’ further Application for stay of execution of the same orders of H. Omondi J (as she then was) delivered on 12/02/2020 in Eldoret High Court Citation Cause No. 45 of 2017. If this is correct, then clearly, the issue of stay of execution is no longer in issue either in the High Court or in the Court of Appeal.”**

**21.** In their instant Application, the Applicants have now exhibited a copy of the Court of Appeal decision delivered on 22/03/2024, which I referred to in my Ruling above, namely, *Kuko & Another v Ali & Another; Robinson (Interested Party) (Civil Application E023 of 2023) [2024] KECA 305 (KLR) (22 March 2024) (Ruling)*. A look at the Ruling reveals that in dismissing the Respondents’ Application for stay pending Appeal, the Court of Appeal found and held as follows:

**“24. It is common ground that the applicants were the administrators of the estate of the deceased, and due to a lack of cooperation the respondents moved the court to have them removed as administrators and the matter is pending before the court. The applicants submitted that the appeal will be rendered nugatory if the stay order is not granted and the court proceeds with the confirmation of the grant, which will have the effect of a house worth Kshs. 70 Million being divided among the beneficiaries of the deceased. They were also apprehensive that they would suffer substantial losses if the division was done.**

25. **This being a succession cause, we find that when the deceased dies without a will or the will is contested and the estate is declared intestate, the property of the deceased is to be divided equitably among the beneficiaries. It follows therefore that no substantial losses will befall the applicants in the event the property in question is divided among the beneficiaries as they will receive their equitable share of the estate of the deceased.**

26. ....

27. **In the application before us, the applicants have not demonstrated to our satisfaction the hardship they are likely to suffer should a stay of execution order not be granted. We find that no prejudice will be occasioned to the applicants.**

28. **In the result, we are not inclined to exercise the Court's discretion in favour of the applicants. Consequently, the application dated 3<sup>rd</sup> May 2023 lacks merit and is accordingly dismissed.”**

22. Regarding the merits of the Application, although the estate comprises of two parcels land, **L.R. No. 2116/XVI/90 Kitale Milimani**, and **Eldoret Municipality Block 5/221**, both which the Court has already distributed, only **L.R. No. 2116/XVI/90 Kitale Milimani** is in issue herein.

23. From the pleadings filed herein, it is clear that the Applicants, despite their shares in the parcel of land **L.R. No. 2116/XVI/90**, having already been identified and confirmed by the Court, have no way of accessing the same shares. The identification and distribution of the shares by the Court therefore risks being render a “paper Judgment”. The history of this matter also demonstrates that the Respondents have deliberately proven to be un-cooperative in many aspects, thus aggravating the already difficult situation. As it is, at the moment, the Applicants’ situation appears to be one that is entirely dependent on the Respondents’ benevolence and charity. They find themselves in the position in which they are, for all intents and purposes, at the mercy of the Respondents.

24. While the Applicants have proposed sale of the parcel of land and distribution of the proceeds among the beneficiaries, as the only viable option out of the quagmire, the Respondents, despite opposing the Application, have not offered any solution of their own. The Respondents have however at the end, stated that they would accept the Applicant’s

proposal if, in addition to the Government Valuer who is to conduct the exercise, the Respondents are also allowed to bring along their own private valuer during the process.

25. For the above reason, I agree that the best option, to avoid further conflicts between the two sides, is to accept and adopt the Applicants' proposal for sale of the parcel of land and distribution of the proceeds among the beneficiaries, while allowing the parties liberty to have their private valuers in attendance.
26. Regarding the prayer for the 1<sup>st</sup> Respondent to render accounts detailing her use or utilization of rent proceeds collected from the said property, the 1<sup>st</sup> Respondent has explained that she occupies the main house, and that it is therefore only one other structure in the compound that is rented out, in the same manner that it was rented out by the deceased before he died, and that the monthly rent is Kshs 40,000/-. She explained that she uses that amount to maintain the property and pay workers, in the same manner that was done by the deceased before his demise. She has exhibited a breakdown of receipts and M-Pesa messages demonstrating the same. This explanation has also not been seriously controverted by the Applicants, and although not verified and only informally presented, I find it to be quite plausible and credible to an acceptable standard. For this reason, that prayer for an account is declined.

### **Final Orders**

27. In the premises, the Chamber Summons dated 30/01/2025 succeeds and I rule and/or order as follows:
  - i) In respect to the orders made herein on 23/10/2024 during confirmation of the Grant herein, it is hereby ordered that the parcel of land known as **L.R. No. 2116/XVI/90 Kitale Municipality**, in respect whereof the share due to each beneficiary was identified and confirmed by the Court, I order that the said parcel of land be sold and the proceeds thereof be shared among the beneficiaries in the proportions set out in the Certificate of Confirmation of Grant issued herein and dated 23/10/2024.
  - ii) That for purpose of the sale and sharing out of the parcel of land, as aforesaid, the parcel of land shall be subjected to a valuation by a Government Valuer and the resultant Valuation Report be filed before Court within 30 days from the date hereof.

- iii) During the valuation to be conducted by the Government Valuer as aforesaid, both parties shall be at liberty to have their own private valuers in attendance for purposes of observation.
- iv) Costs and expenses arising from, or connected to the sale and/or distribution process shall be shared equally as between the Applicants on one part, and the Respondents on the second part.
- v) The Officer Commanding Kitale Police Station is hereby ordered to provide security during the valuation process.
- vi) The 1<sup>st</sup> Respondent, **Truphena Tapen** said to be in occupation, possession or having management of said parcel of land is hereby ordered to give access to the property to the parties, their Advocates, their representatives, valuers, security personnel, and or any other relevant or concerned person, to the property for purposes of conduct of the valuation exercise.
- vii) A suitable purchaser and the purchase price shall only be accepted upon mutual agreement between the two parties. However, in the absence of such agreement, either party shall be at liberty to move the Court to make a decision thereon.
- viii) To prevent conflicts that may cause delays or hinder or frustrate the sale process, and considering the non-cooperation displayed by the Respondents in previous instances in this matter, I hereby direct that the sale and distribution of proceeds shall be handled by the Applicants' Advocates on record, **Messrs Daniel Orange & Co.** who shall however ensure that they keep the Respondents always updated thereon, and supply to the Respondents all relevant information upon request, and must always also copy or forward to the Respondents all communication and/or correspondence with third parties relating to the sale and/or distribution of the proceeds.
- ix) Once a purchaser has been agreed upon and has made a commitment, the 1<sup>st</sup> Respondent, **Truphena Tapen**, or any person currently in occupation therefrom, shall at the discretion of the committing purchaser, if the terms of the Agreement for Sale allowed him such discretion, vacate from the property, within timelines demanded.

x) Being a family matter, each party shall bear her own costs of the Application.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Mr. Orange for Applicants**

**Ms. S. Awuor h/b for Sala for the Respondents**

**Court Assistant: Brian Kimathi**