In re Estate of Adam Chebelieny Kibosia (Deceased) (Succession Cause E129 of 2019) [2025] KEHC 12566 (KLR) (15 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE E129 OF 2019

RN NYAKUNDI, J

SEPTEMBER 15, 2025

IN THE MATTER OF THE ESTATE OF THE LATE ADAM CHEBELIENY KIBOSIA – DECEASED

BETWEEN

MARGARET JEMUTAI KIBOSIA ..... 1ST PETITIONER

MILKA JEBET CHEBELIENI ..... 2ND PETITIONER

AND

DR. JOHN CHERUIYOT KIBOSIA ..... 1ST OBJECTOR

KIPRONO CHEBOI KIBOSIA ..... 2ND OBJECTOR

RULING

1. What is pending before this court for determination is Notice of Motion dated 8th July, 2025 expressed under the provisions of section 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, section 47 of the Succession Act as read together with Rule 73 of the Probate and Administration Rules. The applicants seek orders as follows:

    a. Spent

    b. The Honourable court be pleased to grant the Objectors/Applicants leave to lodge an appeal in the Court of Appeal against the Ruling of the Court delivered on 26th June, 2025.

    c. That in granting prayer (b) above the Honourable Court be pleased to enlarge time within which to file a Notice of Appeal against the Ruling of the court delivered on 26th June, 2025 pursuant to the provisions of Rule 77 of the Court of Appeal Rules 2022.

    d. Costs be in the cause.

2. The application is anchored upon grounds that:

a. On 26th June, 2025, the Honourable Court dismissed the applicants' application dated 10th June, 2025 with costs.

b. That the said application was seeking that the applicants be granted leave to recall PW1 and consequently avail some of the documentary evidence that had been inadvertently left out.

c. That on delivery of the said Ruling dated 26th June, 2025 the applicants through their counsel orally sought the leave of court to lodge an appeal against the said Ruling pursuant to Rule 41 of the Court of Appeal Rules but the Honourable Court declined and directed the applicants to file a formal application.

d. That in the view of the Ruling of the Court delivered on 26th June, 2025, it is apparent that the deed plans that the applicants intended to produce as exhibits have been automatically locked out and as such the applicants will suffer prejudice.

e. That it is in the interest of justice that the applicants be granted leave to lodge an appeal in the Court of Appeal.

3. In response to the application, the 1st petitioner swore a replying affidavit stating as hereunder:

a. That I had mentioned to the court earlier in my replying affidavit dated 17th June, 2025 that the applicant's sole intention is to use every opportunity and tick to continue using the property to our detriment and I still stand by the sentiments therein.

b. That I believe that this honourable court rightfully dismissed the application dated 10th June, 2025 as the court is aware of the games that have been played by the applicant all along.

c. That I believe that this court still has the authority and mandate to ensure a timely disposal of this cause, as provided by *the constitution*.

d. That I have been advised by my advocates, which advice I believe to be true that nothing stops this court from dismissing the application before it and directing that this matter proceed to hearing.

e. That this court has a duty and authority to bring an end to these proceedings by concluding the hearing and proposal on distribution as presented by the parties and should there be any dissatisfaction the parties can then move the court of appeal over the final judgment instead of the rulings. The applicant will then have an opportunity to address the totality of the judgment and distribution.

4. In further response, the 2nd petitioner equally filed a replying affidavit in which she made the following averments:

a. That from the record, our father whose estate is subject of the proceedings died on 29th October, 2009.

b. That since then the estate has remained unadministered for over 15 years and have been prone to wastage, loss and other risks.

c. That indeed our brothers, who form part of coterie of applicants have never seen the need to have the matter concluded.

d. That the reason for their relactance has already been made clear in the proceedings so far it has become clear that our brothers use and occupy large tracts of our father's estate especially that parcel of land known as MOIBEN LR3208.

e. That there is clear conspiracy to ensure that this matter delayed in the judicial conveyor belt because that delay serves the interests of the applicants – they continue to derive benefit from our father's land estate to the detriment of the daughters of the family.

f. That from the evidence tendered so far, it is apparent that the applicants had already shoved our MOIBEN LR3206 amongst themselves as sons leaving out all daughters.

g. That the obvious narrative being peddled by the applicants is that they are the only ones entitled to inherit our father's estate since they are male children.

h. That it is these same applicants who challenged a mediation settlement agreement reached way back on 19th December, 2019 where parties had already agreed on the mode of distribution that was fair on all parties.

i. That the mediation settlement was adopted in court on 3rd February, 2020, these applicants did not object – they waited until a month down the line and then had a rethink, and challenged the agreement vide an application filed dated 3rd March, 2020.

j. That in a ruling delivered n 5th July, 2021 the honourable judge dismissed the said application.

k. That the same applicants preferred an appeal against the said ruling – a process that took over 3 years – when the Court of Appeal delivered a judgment setting aside the mediation settlement. This judgment was delivered on 20th September, 2024.

l. That this outcome paved way for hearing of the objection by the applicants on merit – a process that indeed took off in earnest in April this year.

m. That in the cause of hearing of the objector's case, and when through cross-examination revealed clear deficiencies in their case, the objectors suddenly changed that and sought to introduce new documents in a bid to plug holes that have been so expertly revealed in their testimony to achieve that objective.

n. That the applicants filed the application dated 10th June, 2025 seeking leave to file new evidence and bring in more witnesses.

o. That this court dismissed the said application on 20th June, 2025.

p. That yet again, the objectors have filed another application, one dated 8th July, 2025 – this time round seeking leave to appeal the court's ruling of 26th July, 2025.

q. That once again we are being taken through the same circle that the applicants took us through with regard to the mediation settlement. The only intention of the applicants is to have this matter held in abeyance as they pursue an appeal that for all intents and purposes is frivolous.

r. That the applicants are banking on passage of time to enable them continue to derive benefits from our father's estate to the detriment of female beneficiaries of the state.

s. That I am advised by my advocates on record on which advise I verily believe that the law frowns upon interlocutory appeals as they do not advance justice whatsoever.

t. That I am further advised that the issues sought to be addressed in the purported can await the conclusion of the case on the merits.

u. That the principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicant must prove to the satisfaction of the

court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the Respondent will not be unduly prejudiced by the order being made.

v. That the applicant herein has not shown that they deserve the orders sought herein as they have not given any explanation of the delay nor have they attached a Memorandum of Appeal for this Honourable Court appraise itself on the arguability of its appeal.

w. That besides the application is not made in good faith as the applicants only seek to derail this matter further and prevent from us having ever get justice in due time as they are in occupation of the property of our deceased father.

x. That in any case, the applicants seek to further an injustice as this matter has been in court snce 2019 and to delay it further to its conclusive and timely determination will amount to our Constitutional rights as dependants to beneficiaries.

Analysis and determination.

5. I have considered the application and the responses as filed by the petitioners. The applicants are seeking leave of this court to lodge an appeal to the Court of Appeal against the decision of this court delivered on 26th June, 2025. In considering whether or not to grant such leave, there are various factors to take into account as were expressed in the case of Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR where the Court of Appeal stated as follows:

> "In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.
>
> 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 merit serious judicial consideration."

6. However, as I sit to determine this application, I find myself confronting unusual twist of circumstances that would need some consideration. The applicants seek leave to appeal my ruling of 26th June, 2025, which dismissed their application to recall witnesses and adduce additional evidence. Yet buried within the affidavits before me lies a revelation that fundamentally alters the landscape of this dispute, a revelation that was conspicuously absent when this court delivered that very ruling they now seek to challenge.

7. The 2nd petitioner, in her replying affidavit, has disclosed a decision that was delivered on 20th September, 2024, where the Court of Appeal set aside the mediation settlement agreement that had governed these proceedings since February 2020. This appellate decision, which came to light only through these current proceedings, directed that the matter proceed to hearing on merit.

8. When I delivered the ruling of 26th June, 2025, this court operated with the understanding that the mediation settlement remained intact and binding. This court's decision to dismiss the application for additional evidence was influenced, in part, by the existence of what I believed to be a subsisting agreement between the parties. The Court of Appeal's intervention, which predated my ruling by

some nine months, has rendered that foundation fundamentally flawed. This court was, quite simply, making pronouncements in a vacuum unaware that the very premise upon which the proceedings rested had been swept away by our appellate court.

9. When the Court of Appeal set aside the mediation settlement and directed that the matter proceeds to hearing on merit, it created an imperative for this court to ensure that all relevant evidence is properly before it. The appellate court's directive was clear: the objection should be heard in earnest, suggesting a comprehensive examination of the merits rather than the abbreviated proceedings that have characterized this matter thus far.

10. The deed plans and survey evidence that the applicants sought to introduce, evidence that I deemed inadmissible in my June ruling, may well be crucial to determining the true intentions of the deceased regarding the distribution of his estate. The Court of Appeal's decision to set aside the mediation settlement suggests that the previous consensus among beneficiaries was perhaps built on shaky foundations, making it all the more important that this court has access to all material evidence in determining the rightful distribution of the estate.

11. I am reminded of the ancient maxim that justice delayed is justice denied. This estate has remained in limbo for over fifteen years, with the deceased having passed on in October 2009. The beneficiaries, both male and female have endured more than a decade and a half of uncertainty about their inheritance rights. The Court of Appeal's decision to set aside the mediation settlement and direct a hearing on merit was presumably motivated by a desire to finally resolve this matter based on the true merits rather than on potentially flawed agreements.

12. In law Judgement acts by a affixed rule, it admits of no question or variation, discretion acts according to circumstances and is its own rule. Judgement determines in the choice of what is good, discretion sometimes only guards against error or direct mistakes, it chooses what is nearest to the truth. It is trite that judgement is a decision which affects the merits of the question between the parties by determining some right of liability and does not include a mere formal order or an order regulating the procedure in a suit. In respect to this case, my belatedly reading of the Court of Appeal decision was to have this long protracted intestate estate he resolved by this court by taking evidence with an ultimate judgement on the merits. It goes without saying that during the pendency of these proceedings inconsonant with the court of appeal directions, for reasons which are not privy to this court the so referenced Superior Court decision was never brought to my attention so as to appreciate, conceive, and take Judicial notice of the status of the litigation which commenced some years back. During the commencement of the trial, may be out of an oversight, it never dawned on the court that the entire proceedings including the mediation agreement had been set aside and it was now for this court to invoke jurisdiction denovo on distribution of the estate to the heirs. The Court of Appeal left open the issue in respect of the facts and circumstances of the legal principles with regard to this intestate estate by directing the High Court to decide the matter afresh.

13. be dint of the *Law of Succession Act*, the legitimate beneficiaries under Section 29 of the same statute upon the demise of the biological father or mother have a vested interests on the rights, to property by the operation of the law. The word “vested” is defined in Black’s Law Dictionary (6th Edition) at page 1563 as “vested...fixed, accrued, settled, absolute, complete, having the character or given in the rights of absolute ownership, not contingent, not subject to be defeated by a condition precedent. Rights are vested when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest, mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute “vested rights”

14. The intestate estate has remained in limbo and undistributed since 22.10.2019 thus limiting enjoyment of both movable and immovable property rights survived of the deceased by the beneficiaries or dependants legitimately so recognised by the law. The said common order intimated to be appealed against was anchored on the historical litigation of the Succession cause and on non-disclosure of material facts including the setting aside of the mediation agreement by the Court of Appeal. I have considered the rival submissions in detail with regard to the instant application seeking leave of this court to invoke the jurisdiction of the Court of Appeal as whether the discretion to deny admission of additional evidence in the pending trial was proper exercise of discretion. Given the background alluded to Section 80 of the CPA and Order 45 Rule 1 of CPR could be the proper legal protocol so that this cause of action can be addressed with finality by the trial court. The parties and their respective legal counsels concentrated more in the submissions on the subject of leave to appeal and its import and risk of prejudice or occasioning injustice against the beneficiaries who have been on the waiting list for the court to determine the distribution of the estate from which a certificate of confirmation of grant shall be issued setting out the scheme of sharing the estate to the legitimate heirs. Without necessarily making an attempt as if to sit on a appeal against my own judgement the inherent jurisdiction of this court as provided for under Rule 73 (1) of the Probate and Administration Rules, the overriding objective, under Section 1(A) and finally inherent jurisdiction expressly stated in Section 3 and 3(A) of the CPA come in handy to address the stalemate for the interests of justice. Learned author H. Jacob " The Court's inherent jurisdiction"(1970)23 CLP 23 defines inherent jurisdiction as the " residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. In his account Jacob summarised the fundamental of the inherent jurisdiction as follows:

    a. The inherent jurisdiction is exercised as part of the administration of justice and in relation to the process of litigation, it is procedural not substantive.

    b. Its distinctive and basic feature is that it exercised by way of summary process rather than normal trial.

    c. Its nature as part of the machinery of justice means that a court can exercise it against anyone, whether a party to proceeding at issue or not

    d. It is distinguishable from the exercise of judicial discretion, and

    e. Rules of Court provides powers in addition to-not as a substitute for-the powers arising from the inherent jurisdiction.

    The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers. It operates as a valuable weapon in the hands of the court to pre3vent any clogging or obstruction of the stream of justice"

15. As WH Charles Inherent jurisdiction and its Application by Nova Scotia Courts Metaphysical, Historical or Pragmatic puts it this way " that Inherent jurisdiction" is then a self-generation intrinsic source of power. The terms "Jurisdiction" and power are frequently used together or interchangeably. It might be, perhaps more accurate to think of the term "jurisdiction" as the source of powers but this distinction is not often made,

16. The court system of Kenya is a creature of *the constitution* set up to settle dispute through a legal process. The citizens of Kenya approach the various courts across the country with a legitimate expectation that each level will resolve their conflicts amicably, qualitatively, fairly, and justly. Therefore, a court like the

one I'm privileged to preside over, by virtue of my oath of office is a place where justice is judicially administered according to the laws of the land.

17. It is in regard to the above analysis that it becomes imperative that this court must invoke the inherent jurisdiction as an arbiter under Art. 50 (1) of *the constitution* to hear and determine the substantive issues as earlier own directed by the Court of Appeal. It is to this end, I am guided by the principles in Thungabhadra Industries Ltd. V. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, IAIR 1964(SC 1372) in which the court observed as follows: "A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this reference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument once could point to the error and say here is a substantial point of law which stares one in the fact, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of record would be made out" (See also Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others SC Pet. No 6 of 2014. Waithaka v Bashaeki & 2Others (Civil Appeal 91 of 2018 (2024) KEHC). National Bank of Kenya Ltd vs Ndungu Njau(1996) KLR 469)

18. I have spoken on the impugned ruling which is open to review for reasons of an error apparent on the face of the record based on the mediation agreement duly set aside by the Court of Appeal and that can be seen by one of the declarations of putting an emergency brake to the on-going litigation inconsonant with the Court of Appeal orders. This justifies the court to draw from the fountain of the law in Section 1(A), 3, 3(A) 80 of the CPA as rea with order 45 Rule 1 together with Rule 73(1) of the Probate and Administration Rules to exercise its inherent jurisdiction and the power of review to set aside the impugned orders. This will pave way the litigation contemplated by the parties and which had commenced in earnest to proceed and be concluded within a reasonable time as counter demanded by Art. 50 2 (e) of *the constitution*

19. In these circumstances, I find myself compelled to examine whether the interests of justice require a departure from the ordinary course. The applicants' request for leave to appeal, while procedurally competent, pales in significance compared to the broader question of whether this court should exercise its inherent jurisdiction to ensure that justice is ultimately served. The doctrine of functus officio would ordinarily prevent me from revisiting my earlier ruling, but the emergence of material facts that were not before the court at the time of that ruling presents exceptional circumstances.

20. In Benjoh Amalgamaged Limited v Kenya Commercial Bank Limited [2014] eKLR, the consideration by the Court was whether it had power to review its decision. The Court stated:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."

21. Guided by the above decision and in the exercise of my discretion, and mindful of the Court of Appeal's directive that this matter proceed to hearing in earnest, I am satisfied that the interests of justice require that the evidence which the applicants sought to adduce in their June application should now be

admitted. This is not to suggest that my earlier ruling was incorrect based on the information then available, but rather to acknowledge that changed circumstances and material non-disclosure have created a situation where rigid adherence to that ruling would work an injustice.

22. The overriding objective in Section 1(A) as read with 1(B) of the *Civil Procedure Act* can be paraphrased as follows: "That it enables the courts to deal with cases justly. Dealing justly with a case includes: ensuring that it is dealt with expeditiously and fairly. It also mandates the court to give effect to the overriding objective when it exercises any discretion given to it by the Rule or interprets any rule. In Purdy v Cambrian (1999) ALL ER (D) 1518 the court hele inter-alia as follows: " The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed...'. 51 The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case.... Lord Woolf MR in Biguzzi was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective...."

23. In answering the many issues, which might arise, I adopt the principles in this comparative jurisprudence, the object of it being to undertake the adjudication of the outstanding issues in this intestate estate to meet the ends of justice. It seems to me that there is a substantial risk that a fair trial cannot be achieved in this case if parties are allowed to litigate on interlocutory applications either before this court or in the forum on the court of appeal. The kind of determination being sort here is about the outlined general powers of the right of appeal which at this stage is denied so that the court can comply with the directions of the superior court to proceed quickly and efficiently to determine the Succession Cause which can be classified as a backlog requiring a rapid results initiative from this court.

24. For those reasons, the following orders shall abide: That

    a. First Leave be and is hereby denied to move to the Court of Appeal.

    b. Second, the applicants shall be permitted to adduce the deed plans and survey evidence relating to parcel Moiben LR 32/08 that they sought to introduce in their application dated 10th June, 2025.

    c. Third, the petitioners shall be afforded an opportunity to file any responsive evidence within 10 days of this ruling. The matter shall thereafter proceed to hearing on the substantive objection already ongoing on the 29.9.2025 on a priority basis.

    d. As for the application dated 8th July, 2025, it is as well spent given the circumstances as addressed in this Ruling.

e. I direct that each party shall bear their own costs of this application.

25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF SEPTEMBER, 2025.

.....

R. NYAKUNDI

JUDGE