REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO 85 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE TABITHA WAITHERA KAMAU (DECEASED)

VINCENT NJOGU KIHUGA……1ST APPLICANT

ANTHONY KIMANI KIHUGA……2ND APPLICANT

PETER KIBIRA KIHUGA……3RD APPLICANT

MICHAEL KINYAJUI KIHUGA……4TH APPLICANT

VERSUS

JANE WANJIRU NGARUIYA (ON BEHALF OF THE ESTATE OF NGARUIYA KAMAU…….

…….RESPONDENT

Coram: Before Justice R. Nyakundi

M/s Tum & Associates Advocates

M/s Ngigi Mbugua & Co Advocates

M/s Odero & Associates Advocates

M/s Anassi Momanyi & Co Advocates

M/s Mosongo & Co Advocates

M/s Mathai Maina & Co Advocates

M/s Chemoiyai & Co Advocates

M/s Wambua Kigamwa & Co Advocates

RULING

1. What is pending before this Honourable Court is Summons for stay of execution and leave to appeal to the Court of Appeal brought pursuant to section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate

and Administration Rules and Rule 41 of the Court of Appeal Rules where the Applicants are seeking the following orders: -

a. Spent
b. That the Honourable Court be pleased to order stay of execution or implementation of the part of the judgement dated 11th October 2024 and in particular Grant an order barring and inhibiting the registration of Grant and Transmission and/Transfer of parcel No. ELDORET MUNICIPALITY BLOCK 12/184 pending the hearing and determination of the intended appeal.
c. That leave be granted to the Applicants to file an appeal to the Court of Appeal of Kenya against part of the decision/Judgment of this Honourable Court given at Eldoret on 11th October 2024.

2. The Application is made on the following grounds on the face of it among others and in the annexed Affidavit dated 28th October 2024 sworn by Vincent Njogu Kihuga, the 1st Applicant who deponed as follows: -

a. That I am the Petitioner and a beneficiary of the Estate of Tabitha Waithera Kamau (deceased).
b. That I have the authority to swear this Affidavit on my behalf and on behalf of ANTHONY KIMANI KIHUGA, PETER KIBIRA KIHUGA and MICHAEL KINYANJUI KIHUGA.
c. That we are dissatisfied with part of the judgement made and delivered o 11th October 2024 in respect to the Estate of Tabitha Waithera Kamau.
d. That being dissatisfied with part of the said judgement, we intend to Appeal to the Court of Appeal and we have already filed Notice of Appeal.
e. That through our counsel on record, we have made an application for typed proceedings.
f. That this affidavit is therefore made in support of the application to be granted leave to file an Appeal at the Court of Appeal.

g. *That the affidavit is also made in support of the application seeking orders for stay of execution or implementation of part of the Judgement dated 11th October 2024 and in particular Grant an order barring and/or inhibiting the registration of Grant and/Transmission and Transfer of parcel No. ELDORET MUNICIPALITY BLOCK 12/184 pending the hearing and determination of the intended Appeal.*

h. *That our grounds of Appeal have merit and arguable as demonstrated in the Draft Memorandum of Appeal.*

i. *That the beneficiaries of the Estate of Tabitha Waithera Kamau stand to suffer substantial loss and damage if the registration and transmission of Grant is made whereas the intended appeal shall not have been heard.*

j. *That the Respondent shall not suffer any prejudice as the application has been brought promptly and in the interest of justice.*

3. The Summons is further supported by a Further Affidavit dated 28th April 2025 sworn by Vincent Njogu Kihuga, the 1st Applicant herein who deponed as follows: -

a. *That I am the Petitioner and a beneficiary of the Estate of Tabitha Waithera Kamau (deceased).*

b. *That I have authority to swear this Affidavit on my behalf and on behalf of ANTHONY KIMANI KIHUGA, PETER KIBIRA KIHUGA and MICHAEL KINYANJUI KIHUGA.*

c. *That our Advocate filed an application dated 28th October 2024 seeking orders for stay of execution or implementation of the part of the Judgment dated 11th October 2024 over parcel number ELDORET MUNICIPALITY BLOCK 12/184 pending hearing and determination of the intended appeal.*

d. *That the application is pending for hearing and determination.*

e. *That one of the Objectors, Jane Wanjiru Ngaruiya has instituted a suit against the Administrators/Beneficiaries at the Environment and Land*

Court at Eldoret over parcel number ELDORET MUNICIPALITY BLOCK 12/184.

f. *That Jane Wanjiru Ngaruiya has instituted a suit being Environment and Land Court Case No. E009 of 2025 claiming that Administrators/Beneficiaries have trespassed in to the Applicant's parcel of land.*

g. *That Jane Wanjiru Ngaruiya is seeking to evict the Defendants who are the Administrators/Beneficiaries of the Estate from the suit land and further obtain an order compelling the Defendants to transfer the land in her favour.*

h. *That it is in the interest of justice that the application dated 28th October 2024 is certified urgent and heard expeditiously.*

i. *That the beneficiaries of the Estate stand to suffer irreparable loss if the orders sought in the application dated 28th October 2024 are not granted.*

j. *That I pray the application is allowed and the reliefs sought be granted as prayed.*

4. The Summons was opposed vide a Replying Affidavit dated 11th November 2024 sworn by Jane Wanjiru Ngaruiya, the Respondent herein who deponed as follows: -

a. *THAT I am the Administrator of the Estate of the late NGARUIYA KAMAU the Objector herein hence competent to swear this Affidavit.*

b. *THAT I have been shown by my Advocate on record Mr. Mathai the Applicants' application dated 28th October, 2024, having read it and the same explained to me, I have understood its import, Tenor and content therein and I now wish to respond as hereunder: -*

c. *THAT the said application is fatally defective, discloses no reasonable cause of action, incompetent, frivolous, vexatious, scandalous and an abuse of the Court process hence the same ought to be dismissed in limine.*

d. *THAT I am being informed by my Counsel on Record Mr. Mathai, whose information I believe to be true and accurate that the Applicants have not met the required threshold for stay of execution.*
e. *THAT the late NGARUIYA KAMAU and TABITHA WAITHERA KAMAU owned that parcel of land known as ELDORET MUNICIPALITY BLOCK 12/184 as Tenant in common and the same was well split out in the Agreement they entered dated 16th October, 1981.*
f. *THAT it was an express term of the agreement dated 16th October, 1981 that the late Ngaruiya Kamau and Tabitha Waithera Kamau that they were to hold the said plot as tenants in common in equal share and in due course be both registered as such in the certificate of Lease.*
g. *THAT it was also agreed expressly that the late Tabitha Waithera Kamau was to transfer half share to the late Ngaruiya Kamau.*
h. *THAT I am aware that Elud Kihuga had commenced these proceedings without and known as ELDORET MUNICIPALITY BLOCK 12/184 in common with me in this ground.*
i. *THAT the Administrators herein were appointed via court Ruling dated 16th December, 2022.*
j. *THAT the Deponent herein is not represented by the firm of Tum & Associates but by the firm of Ngigi Mbugua and Company Advocates.*
k. *THAT I am being advised by my Advocate on record Mr. Mathai, whose advice I believe to be true that this application offends the provisions of Order 9 Rule 1, Order 9 Rule 5, Order 9 Rule 6, Order 9 Rule 7 and Order 9 Rule 9 all of Civil Procedure Rules hence incompetent and fatally defective.*
l. *THAT I am further being advised by my Advocate on record Mr. Mathai whose advice I believe to be true that the Applicants have not complied with the provisions of Rule 77(3) and 79 of the Court of Appeal Rules 2022 hence being fatally defective.*
m. *THAT I swear this affidavit in opposition to this application.*

n. *THAT what is deponed to herein above is true to the best of my knowledge.*

o. *In addition, to the other evidential material filed before this court one Vincient Njogu Kiuga deponed as follows in his affidavit.*

i. *That I am one of the Administrators and a beneficiary of the Estate of James Samuel Kihuga Chege (deceased)*

ii. *That I have read and understood the contents of the Summons dated 7th November, 2024, filed by the Applicant Morris Gitau seeking stay of execution of the judgment delivered by this Honourable Court o 11th October, 2024, and I respond thereto as follows*

iii. *That the said application is misconceived, unmerited, frivolous and an abuse of the process of the fruits of a valid judgment delivered in faovur of the petitioners*

iv. *That the Applicant has not demonstrated the existence of substantial loss that would be suffered should the decree be executed, as required under Order 42 Rule 6(2) (a) of the Civil Procedure Rules. The mere allegations and speculative fears are insufficient to warrant the exercise of the courts discretion*

v. *That the Applicant has been indolent and guilty of laches, having filed the instant application after an unreasonable delay since the delivery of judgement, contrary to the requirement of promptness under the law*

vi. *That I am advised by my counsel which I believe to be true that the Applicant has not sought or obtained leave of this Honourable*

court to file an appeal, as required in practices and procedure rules, which require leave before an appeal can be lodged.

vii. *That in the absence of such leave, any intended appeal be incompetent and totally defective hence this court cannot anchor an order for stay of execution*

viii. *That the Appeal has not attached any draft memorandum of Appeal to point out the arguable points of law that is alluded, thus the application lacks substance and is based on conjecture rather merit*

ix. *That the Petitioners lawfully obtained judgment after full hearing on merit, and the applicant has neither shown any apparent error or any injustice suffered to warrant the stay sought.*

x. *The right of appeal cannot operate to automatically stay execution and the Applicant must satisfy all stator condition before this Honourable court can exercise its discretion in favour of stay*

xi. *That the Petitioner stands to suffer great prejudice if the stay is granted, as they have been denied the fruits of their judgment for a long period, whereas the Applicant continue to enjoy the benefits of the impugned acts contrary to the interest of justice as he is in occupation of the one acres of the properties that was distributed*

xii. *That this Honourable court having rendered its considered decision after full participated of both parties ought to allow its decree to take affect unless there are compelling and exceptional circumstances, which the Applicant has failed to demonstrate.*

xiii. That the Applicants intended appeal, if any, is frivolous and not arguable, and the Application for stay is merely a tatic to frustrate and delay the lawful execution of the courts order.

xiv. It is in the interest of justice and fairness that the Application dated 7th November 2024 be dismissed with costs, so as to allow the petitioners to proceed with the implementation of the courts judgement.

xv. What is deponed herein is true to the best of my knowledge, information and belief.

5. The Summons was canvassed by way of written submissions.

Applicants' Written Submissions

6. The Applicants filed their written submissions dated 24th September 2025 through their learned Counsel Ms. Tum listed 3 issues for determination as follows:

a. *Whether the Applicants are entitled to an order for stay of execution pending the Hearing and Determination of the intended Appeal?*

b. *Whether Leave to Appeal ought to be granted?*

c. *Whether the Firm of M/S Tum & Associates Advocates is Properly on Record?*

7. The learned counsel for the Applicants, Ms. Tum submitted that the Applicants were entitled to an order for stay of execution pending the hearing and determination of the intended appeal. Counsel stated that the power to grant stay of execution is a discretionary one exercised judiciously under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to preserve the estate and ensure that an appeal is not rendered nugatory. She cited the said provisions

emphasizing that the High Court has inherent jurisdiction to make orders necessary for the ends of justice and to prevent abuse of court process.

8. Counsel further submitted that the conditions for granting stay are those set out under Order 42 Rule 6(2) of the Civil Procedure Rules namely: (a) substantial loss, (b) absence of unreasonable delay and (c) provision of security. On the first condition, she argued that the Applicants and other beneficiaries of the estate stand to suffer substantial and irreparable loss should the grant be registered, transmitted and the property transferred to a third party or stranger who has not proved ownership of Eldoret Municipality Block 12/184. The Respondent representing the estate of Ngaruiya Kamau, relied on a partnership agreement of 16th October 1981, claiming equal ownership of the land, but counsel argued that the title was solely registered in the name of Tabitha Waithera Kamau indicating no joint ownership. The deceased Ngaruiya Kamau never took legal action to enforce the alleged agreement during his lifetime, and thus the Respondent's claim amounts to unjust deprivation of the Applicants' rightful inheritance.

9. Ms. Tum the Learned Counsel added that the Respondent has since filed a suit before the Environment and Land Court seeking to evict the Applicants and compel them to transfer the property which demonstrates the imminent loss and prejudice they stand to suffer without stay orders. She cited **James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR** and **Mukuma Vs Abuoga (1988) KLR 645**, where it was held that substantial loss is the cornerstone of stay applications, as it preserves the subject matter and prevents an appeal from being rendered nugatory.

10. On timeliness, counsel submitted that there was no unreasonable delay as the Notice of Appeal was filed within eleven days of the ruling, and the present application followed shortly thereafter. She further noted that although the Applicants were unable to offer security given the family nature of the matter, the court should exercise discretion to waive that

requirement as held in **Re Estate of the Late Kibet Sang (Deceased) [2025] KEHC 2736 (KLR)** and **Re Estate of James Mutonga Mulinge (Deceased) [2024] KEHC 4155 (KLR)** which recognized that succession proceedings are not commercial disputes requiring security.

11. On the second issue, whether leave to appeal should be granted, Ms. Tum submitted that under the Law of Succession Act, there is no automatic right of appeal and one must seek leave from the High Court. She cited **Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another [2014] eKLR**, which held that leave to appeal should be granted where the intended appeal raises arguable grounds that merit serious judicial consideration. Counsel maintained that the Applicants' draft Memorandum of Appeal raises weighty questions of both fact and law, particularly on whether the trial court erred in holding that Eldoret Municipality Block 12/184 was co-owned despite lack of proof. She cited **Kenya Commercial Bank Ltd Vs Nicholas Ombija [2009] eKLR** and **Stanley Kang'ethe Kinyanjui Vs Tony Ketter & 5 Others [2013] eKLR** reiterating that an arguable appeal is not one bound to succeed but one deserving of judicial determination.

12. On the third issue, whether the firm of M/s Tum & Associates Advocates is properly on record, counsel submitted that her firm had been on record throughout the proceedings and was duly instructed by the Applicants for purposes of filing the appeal. The firm also filed a proper Notice of Appeal and complied with Rules 77(3) and 79 of the Court of Appeal Rules, 2022 by serving all parties as required. She argued that any alleged procedural lapses raised by the Respondent were mere technicalities that did not cause prejudice or affect the substance of the case. She invoked Article 159(2)(d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act, urging the Court to prioritize substantive justice over procedural technicalities. Counsel cited **Tobias M. Wafubwa Vs Ben Butali [2017] eKLR** and **Rose A. Ochanda & Another Vs Richard Wafula Makokha t/a R.M. Wafula & Co.**

Advocates [2022] eKLR, both emphasizing that courts should not strike out applications for minor procedural non-compliance when doing so would defeat justice.

13. In conclusion, Ms. Tum submitted that the Applicants had met the threshold for grant of stay of execution and leave to appeal, and that her firm was properly on record. She urged the Honourable Court to exercise its judicial discretion and allow the application as prayed so as to preserve the estate pending determination of the intended appeal.

Analysis and Determination

14. I have read and considered the summons with the grounds, the supporting affidavits, submissions and the replying affidavit in opposition. There are 3 issues for determination by this Honourable Court: -

a. *Whether the Firm of M/s Tum & Associates Advocates is Properly on Record for the Applicants?*
b. *Whether Leave to Appeal ought to be granted?*
c. *Whether the Applicants are entitled to an order for stay of execution pending the intended Appeal?*

Whether the Firm of M/s Tum & Associates Advocates is Properly on Record for the Applicants, specifically the 1st Applicant?

15. From the record, it is not in dispute that prior to the delivery of the impugned judgment dated 11th October 2024, the firm of Ngigi Mbugua & Company Advocates was on record for the 1st Applicant, Vincent Njogu Kihuga. The firm of M/s Tum & Associates Advocates only came on record after the delivery of the said judgment, when it filed the present Summons dated 28th October 2024 together with a Notice of Appeal and a Draft Memorandum of Appeal. The Respondent has raised issue that M/s Tum & Associates Advocates is not properly on record for the Applicants,

having come on record post-judgment without complying with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010, which govern change of advocates after judgment has been delivered. Specifically, Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

> *"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-*
>
> *(a) upon an application with notice to all the parties; or*
>
> *(b) upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."*

16. The clear import of this provision is that once judgment has been delivered, an advocate seeking to come on record for a party must either obtain leave of the court through a formal application served upon all parties or file a consent executed between the outgoing and incoming advocates. This requirement is mandatory and non-compliance renders all pleadings filed by the incoming firm irregular and incompetent. In the present case, no consent between Ngigi Mbugua & Company Advocates (the firm previously on record) and M/s Tum & Associates Advocates has been filed. Likewise, no formal application seeking leave of the court to come on record has been presented or allowed. The record is devoid of any Notice of Change of Advocates duly filed and served upon all parties in accordance with Order 9 Rule 5 of the Civil Procedure Rules.

17. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning

behind the provision was well articulated in the case of **S. K. Tarwadi v Veronica Muehlmann (2019) eKLR** where the Learned judge observed as follows:

"...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

18. The provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court. In the instant application, there is no consent obtained from Ngigi Mbugua & Co Advocates. There is further no evidence on record that the application, which is marked to be served upon the said firm was ever served as there is neither a stamped copy duly endorsed by Ngigi Mbugua & Co Advocates confirming service nor an affidavit of service filed as proof thereof.

19. In the case of **Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi (2012) eKLR** the Court held as follows:

"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."

20. In **Florence Hare Mkaha Vs Pwani Tawakal Mini Coach & another [2014] eKLR** wherein the Court held as follows;

"...in this regard I am in agreement with finding of the Court in the case ***John Langat Vs Kipkemoi Terer & 2 others (2013) eKLR*** *where Justice A. O. Muchelule faced with similar circumstances stated-*

> *"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court."*

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.

"It follows that the execution application filed by Mr. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.

It follows that execution that flowed from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates".

21. In **Tobias M. Wafubwa Vs Ben Butali [2017] eKLR**, the court of Appeal held that:-

> *"Once a judgment is entered, save for matters such as Applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or*

to engage other counsel on appeal without being required to file a Notice of change of Advocates or to obtain leave of court to be placed on record in place of the previous advocates.

22. In the court of Appeal case of **Tobias M. Wafubwa (supra)** the court held that:-

"....an appeal to an appellate court is not a continuation of proceedings in the lower court but a commencement of new proceedings in another court where different rules may be applicable for instance, the court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other counsel on appeal without being required to file a Notice of change of Advocate or to obtain leave of court to be placed on record in place of the previous advocates".

23. The court further rendered in the said (above) decision that save for matters such as applications for review, execution or stay of execution a party seeking to change advocate ought not seek leave of court. The court notes that the Summons subject of this ruling was brought by the Appellants in their Draft Memorandum of Appeal. The Applicants had sought an order of stay of execution or implementation of the part of the judgement dated 11th October 2024 and in particular Grant an order barring and inhibiting the registration of Grant and Transmission and/Transfer of parcel No. ELDORET MUNICIPALITY BLOCK 12/184 pending the hearing and determination of the intended appeal. The above circumstances fall squarely on the Court of Appeal decision cited above and therefore, MS Tum & Associates Advocates ought to have sought leave of court to represent the Appellants before filing the Appeal and the summons application dated 28th October 2024.

24. I take cognizance that failure by an Advocate to adhere to the provisions of the Law is not a mere technicality that can be cured by the provisions of Article 159 of the Constitution. In **Julieta Marigu Njagi Vs**

Virginia Njoki Mwangi & another [2022] eKLR, the Court stated as hereunder on the foregoing: -

"I share in the same reasoning as in the above case. Article 159(2) (d) of the Constitution cannot be invoked to cure failure to adhere to provisions of the law. I do not consider the non- adherence to the provisions of Order 9 rule 9 of the Civil Procedure Rule to be an issue of technicality as the words of the provision are couched in mandatory terms, hence compliance is a vital requirement. It follows that Counsel for the plaintiff is not properly on record and hence lacks capacity to file the present application. The application is hereby struck out for failure by counsel to file the consent and seek leave of court either before or on the date of filing the application.

I find that the Preliminary Objection has merits and I hereby allow it."

25. If the drafters of the Constitution were intentional that Article 159 (2) (d) was to render any of the provisions of the statute a lame duck, nothing could have been easier than recommending during the transitional clauses to recommend so to parliament. A statute twinned up with the rules is a will of the legislature conveyed in the form of a text. It is well settled principle of law that a statute is an edit of the legislature and the conventional way of interpreting or construing any of its provisions is for one to look at the intent of the legislature itself. The intention of the legislature assimilates two (2) aspects of the statute and its rules. In this case, it is the Civil Procedure Act and the Civil Procedure Rules 2010. One aspect carries the concept of meaning that is what the words in question mean in every section and rules of the Civil Procedure Act and the Civil Procedure Rules. The other aspect conveys the concept of purpose, object and reasons why the legislature thought it wise to enact such specific provisions for the attainment of procedural and substantive law objectives. In the instant case, there is no ambiguity with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The meaning of words and concepts or sentences in order 9 rule 9 is not so much in a strictly

grammatical propriety of the language used and not even its popular use in the subject matter of change of an Advocate post judgment. It got more to do with the objects to be attained. In essence, what the legislature intended can be legitimately ascertained as a whole by interpreting and construing the provisions purposively to further the purpose or object of the enactment. There are no major exclusion rules in dealing with the provisions so that one can seek refuge in Article 159 (2) (d) of the Constitution.

26. Learned Author CRAIES in his treatise on Legislation, 9th Edition observed as follows on the principles of interpretation of legislation: -

a. *Legislation is always to be understood first in accordance with its plain meaning.*
b. *Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the previous enacted, to the broad purpose of the legislation.*
c. *Where a particular reading would advance the purpose identified and would do no violence to the plain meaning of the provisions enacted, the Courts will be prepared to adopt that reading.*
d. *Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and in particular on a balance of the clarity of the purpose identified and the degree of strain on the language.*
e. *Where the Courts concluded that the underlined purpose of the legislation is insufficiently plain, or cannot be advanced without an unacceptable degree of language used, they will be obligated, however regretfully in the circumstances of the particular case, to leave to the legislature the task of extending or modifying the legislation.*

27. In the present matter, M/s Tum & Associates Advocates came on record after delivery of judgment without first seeking leave of the court

or obtaining the consent of Ngigi Mbugua & Company Advocates who were the advocates properly on record for the 1st Applicant prior to judgment. Consequently, all pleadings including the Notice of Appeal, Draft Memorandum of Appeal and the Summons dated 28th October 2024, were filed by a firm not properly on record. Accordingly, this court finds that M/s Tum & Associates Advocates lacks proper locus standi to represent the Applicants in the present proceedings and their participation offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules. If these provisions of the law are anything to go by, the locus standi of th firm of M/s Tum & Associates Advocates under Article 50 (2)(g) of the Constitution post judgement is voidable rendering the application fatally defective.

The Other aspect of this application is on whether Leave to Appeal ought to be granted?

28. First and foremost, the impugned judgment was delivered on 11th October 2024. The import of the law being the Appellate Jurisdiction Act. The right of appeal in succession matters in my view cannot be equated with normal civil or commercial cases by reasons of their very nature that they incorporate the doctrine of inclusivity and family participation starting from petitioning for the making of grants of representation to the final decree, commonly known as Certificate of Confirmation of Grant. It is therefore imperative that leave to appeal in succession matters be dealt with by the level of Courts with a cautionary statement that there is threshold issue to be met before such a leave should be granted. I consider the following principles to be of significance. The intended Appellant in a Succession matter must present in his or her Memorandum of Appeal substantial questions of law of general importance that needs to be decided by the Court of Appeal. The inheritance rights are unique in their very nature that some family members duly eligible to inherit the estate under section 29 of Law of Succession Act may re-litigate decided

matters not in existence of error of law apparent on the face of the impugned judgement but just to serve their personal interests in the name of exercising constitutional right of appeal.

29. The other fundamental aspect of succession matters is the nature of the text and context given by the legislature under section 35, 36, 37, 38, 40, 41 & 42 of the Law of Succession Act on the metrics of distribution depended upon whether the estate origin is monogamous or polygamous. It is also my view that applying the provisions of the Law of Succession Act which falls within the framework of the social, economic and cultural rights to preserve the dignity and right to life of the definition of family under Article 45 of the Constitution, no heir to an estate should be allowed to limit the rights to property of another equally entitled to the share of the estate for the very reasons that his or her interests have not been fully catered for in the impugned judgment. It is for the legal system of Kenya at various levels to ensure that the enjoyment of those rights are not specifically re-litigated by a section of the members of the same family *ad infinitum* even where there are no substantial questions of law. The standard and burden of proof is vested with the intended appellant to demonstrate such question/questions arose in the lower court in this case the High Court and became a subject of determination but were resolved in uncertainty demanding of the apex court to have the issue canvassed afresh for purposes of setting the record on the law. Mere apprehension by the intended Appellant of miscarriage of justice/prejudice may not be a proper basis for granting certification for an appeal on succession matters to the Court of Appeal. These principles shall mirror when the Court answers the question whether the intended Appellants deserve exercise of judicial discretion to issue an order of certification of leave to appeal in an estate which stands at the cliff of being declared as having violated the provisions of section 76 of the Law of Succession Act for the court to find it fit to revoke the Certificate of Confirmation of Grant for being

inoperative. In addition to the above analysis herein under is the view taken by this Court on the matter.

30. The debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. A dichotomy still lingers amongst eminent commentators, scholars and lawyers. One school of thought posits that there is necessity of leave to appeal in succession matters and the reasons advanced by the proponents of this school of thought are two-fold.

31. The first one was well captured in the case of **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR** by the Court of Appeal in these words: -

> *"We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.''* The second, which has its origins in the Anarita Karimi case, was enunciated in the case of **Mary Wangui Karanja & Another -vs- Rhoda Wairimu Karanja & Another [2014] eKLR**, by Musyoka J. to be that: -
>
> "*...A right of appeal is statutory and since the Law of Succession Act has not provided for such a right the same does not exist. ''*

32. Another school of thought takes the view that the Constitution of Kenya, 2010 provides for unfettered right of appeal. And such provisions in the Law of Succession Act requiring leave to appeal being existing law should be dealt with in accordance with section 7(1) of the Transitional Provisions in the Sixth Schedule of the Constitution: -

> **7. *Existing laws***
>
> ***(1) All law in force immediately before the effective date continues in* force** *and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.* ***[Emphasis mine].***

33. The Court of Appeal recognized this dichotomy of opinion in the case of **Peter Wahome Kimotho Vs Josphine Mwiyeria Mwanu [2014] eKLR** when *VISRAM, KOOME & MARAGA, JJ. A* (as they then were) stated thus: -

> *There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the Civil Procedure Act is not automatically imported into the Law of Succession Act. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the Constitution of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under the Constitution, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.'*

34. Be that as it may, the Court of Appeal in the case of **John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR** held: -

> *"9 .....We re-affirm the decisions of this Court in **Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR** and **Josephine Wambui Wanyoike Vs Margaret Wanjari Kamau & another [2013] eKLR**, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.*

10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in ***Makhangu – v- Kibwana [1996] EA*** *cited by the respondent was succinctly considered by this Court in* ***Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR.*** *In analyzing the Makhangu decision (supra), this Court held 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. (See also in* ***Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981).***

In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant."

35. Even as the debate rages on, I think that the focus should be on the considerations a court should take into account in granting or refusing leave. This necessity emerged in the case of **Rhoda Wairimu Karanja & another Vs Mary Wangui Karanja & another [2014] eKLR** when the Court of Appeal held that;

"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." [Emphasis supplied]

36. According to the above precedent, leave to appeal should normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration by the Court of Appeal. I should add that, exercise of the discretion in granting leave to appeal in succession causes, should be underpinned by the right of appeal provided in the Constitution.

37. Section 3A of the Appellate Jurisdiction Act provides that: -

"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court."

38. Further Article 164(3) (a) of the constitution provides that: - *"3) The Court of Appeal has jurisdiction to hear appeals from (a) the High Court."* These provisions thus donate jurisdiction to the Court of Appeal to entertain appeals from decisions of the High Court. This

includes Probate and Administration disputes determined by the High Court.

Applying the test

39. First and foremost, the applicants have expressed grievance on the part of the decision and/or Judgement of this Honourable court which was delivered on 11th October 2024 and wish to litigate in the Court of Appeal. Having found that the firm of M/s Tum & Associates Advocates is not properly on record, this Court is constrained to decline the prayer for leave to appeal to the Court of Appeal. It is trite that only a party properly before the Court through a duly recognized advocate can competently seek or be granted any substantive relief. In the present instance, no consent between the outgoing advocates, Ngigi Mbugua & Company Advocates and the incoming firm of M/s Tum & Associates Advocates was filed as required under Order 9 Rule 9 of the Civil Procedure Rules nor was there an application for leave to come on record after judgment. In the absence of compliance with these mandatory procedural requirements, all pleadings and prayers filed by the said firm, including the request for leave to appeal are incompetent and void ab initio. The Court cannot therefore entertain or grant leave to appeal at the instance of counsel who lacks legal standing before it. Consequently, the prayer for leave to appeal to the Court of Appeal is hereby denied, the same having been filed by a firm of advocates not properly on record.

40. Secondly, that the averments in some of the disclosures of the nature of interest registrable as between the late Tabitha Waithera and the late Ngaruiya Kamau and the relationship enjoyed with the deceased in creating a legal entity capable of being recognized under the Laws of Kenya is a matter within the knowledge of the Administrators and the law demands of them to present credible, cogent and probative evidence material to determine the net estate of the intestate estate in question. The Court can only determine an issue based on evidence as to whether

which share or the late Tabitha Waithera and the late Ngaruiya Kamau devolves to the survivorship of the intestate estate. I thus come to the conclusion that as long as the marriage between the late Tabitha Waithera and Ngaruiya Kamau was recognized as a valid marriage, it was for the Administrators and the beneficiaries alike to present a memorandum on how the shares shall devolve to each of the beneficiaries or as a collective unit.

41. The major contention under this ground is flawed and as of now cannot constitute a substantial questions of law which cannot be resolved by the administrators under section 80 of the Civil Procedure Act, Rule 73(1) of the Probate and Administration Rules and Order 45, Rule 1 of the Civil Procedure Rules. The Letters of Administration legally referred as Certificate of Confirmation of Grant constitutes a legal document issued by the court which allows the Administrator(s) to manage and distribute the deceased's assets. There is no mention as of now, whether the Administrators are keen to even transmit any part of the assets which are not in dispute. It is my considered view that trial courts in succession matters should follow the letter of the law particularly in these matters of inheritance where the law lays down the procedure to be followed laid down before exercising judicial discretion under Article 50 (1) of the Constitution. Where a step has been missed by such a trial court, it does not follow specifically on succession matters that in every case the failure to comply with the letter of the law will result in setting aside any clause in the Certificate of Confirmation of Grant. The approach ought to be that in order to ensure that litigation in succession matters is not unnecessarily prolonged, an aggrieved beneficiary through the Administrator(s) should file a motion for the court to consider if the omission resulted in a miscarriage of justice under Order 45, Rule 1 of the Civil Procedure Rules as read with Rule 73 of the Probate and Administration Rules. If the Court considers there is no miscarriage of

justice, it may allow the impugned Certificate of Confirmation of Grant to be implemented to the letter or with modifications.

42. On whether the suit land Parcel No. ELDORET MUNICIPALITY BLOCK 12/184 as evidenced by the instruments of registration of the owners, is to be inherited as a division of the individual shares or as a consolidated asset to the eligible beneficiaries is a matter squarely in the hands of the Administrators which shall arise from the consent arrived at by the rest of the beneficiaries to form part of the determinative issue of this Court. It is not for the administrators or the beneficiaries to throw it to the door step of the Court only to allege there is an error of fact and law apparent on the face of the record. If it does not form part of the evidence on record and becomes a patent of law capable of not resolving the issue with finality, it shall then be varied, reviewed and set aside as not being part of the net estate of the deceased capable of being distributed in the impugned Certificate of Confirmation of Grant. Can that alone impeach the entire distribution of the intestate estate of the deceased to the beneficiaries? In my view, the answer is in the negative.

43. The third fundamental question is with regard to latest filings made by the County Surveyor constituting the valuation reports of the various parcels of land forming the estate of James Kihuga in Succession Cause No 34 of 2007 and Tabitha Waithera Kamau-Succession Cause No 85 of 2007. It was the County Surveyor's Report dated 20th August 2025 from which I draw to the attention of the Administrators the following particulars of the assets and assets with its corresponding values.

RE: VALUATION CERTIFICATE OF ASSETS FOR THE ESTATE OF JAMES SAMUEL KIHUGA (DECEASED) SUCCESSION CAUSE NO 34 OF 2007 AND THABITHA WAITHERA (DECEASED) SUCCESSION CAUSE NO 85 OF 2007

	LR NUMBER	**VALUE OF**	**VALUE OF**	**TOTAL VALUE**

		LAND KES	DEVELOPMENTS KES	KES
	Eld Mun Block 16 (Kamukunji) 80	18,000,000	0	18,000,000
	Eld Mun Block 16 (Kamukunji) 1278	800,000	0	800,000
	Eld Mun Block 16 (Kamukunji) 316	1,300,000	4,500,000	5,800,000
	Eld Mun Block 16 (Kamukunji) 317	1,350,000	2,500,000	3,850,000
	Eld Mun Block 2/158/1	6,000,000	3,200,000	9,200,000
	Eld Mun Block 2/159/1	6,000,000	4,500,000	10,500,000
	Eld Mun Block 2/189/1	3,500,000	1,500,000	5,000,000
	Eld Mun Block 5/225/1	13,000,000	6,500,000	19,500,000
	Eld Mun Block 15 (West Farmers) 1724	2,000,000	0	2,000,000
	Eld Mun Block 15 (West Farmers) 1632	2,000,000	0	2,000,000
	LR No. 772/7 IR No. 8266 (Part – half)	135,000,000	0	135,000,000
	Kapsaret/Kapsaret Blk 1 (Yamumbi) 74	18,000,000	0	18,000,000
	Langas 590–610 Section IV	3,500,000	0	3,500,000
	Racecourse/30	2,000,000	0	2,000,000
	Eld Mun Block 9/17 (Border Farm) 89	12,000,000	1,100,000	13,100,000

	Eld Mun Block 9/17 (Border Farm) 79	13,000,000	15,000,000	28,000,000
	Eld Mun Block 9/17 (Border Farm) 203	12,000,000	10,300,000	22,300,000
	Eld Mun Block 12/184	40,000,000	2,900,000	42,900,000
	Eld Mun Block 7/55	100,000,000	8,500,000	108,500,000
	Eld Mun Block 4/4 (Expired Lease)	500,000,000	9,800,000	509,800,000
	Laikipia/Daiga/Ethi Block 2/2050	10,000,000	0	10,000,000
	Laikipia Supuko Block 111/1236	1,000,000	0	1,000,000
	Trans Nzoia/Kaisagat/125	4,500,000	0	4,500,000
	Murang'a Loc.3/Mungaria/495	11,500,000	0	11,500,000
	LR No. 57/766 IR No	8,500,000	0	8,500,000
	Kiambu/Dagoretti/ Kangemi/S.175	15,000,000	5,500,000	20,500,000
	TOTAL	**939,950,000**	**75,800,000**	**1,015,750,000**

44. Just by the above facts, as tabulated by the County Surveyor, an expert in Land matters and its progression value, the intestate estate comprises of two (2) deceased persons symbolizing the denominator of non-distribution to the legitimate beneficiaries under section 29 of the Law of Succession Act. The number of beneficiaries are known and there is no dispute about that. What is extractable from the annexed registration instruments, it is crystal clear that the following titles indicates the following as proprietors.

Title No	**Proprietorship**	**Encumbrances**

Eldoret Municipality Block 16 (Kamkunji) 80	Samuel Kihuga	
Eldoret Municipality Block 16 (Kamkunji) 127	Samuel Kihuga	
Eldoret Municipality Block 16 (Kamkunji) 316	Samuel Kihuga	
Eldoret Municipality Block 16 (Kamkunji) 317	Samuel Kihuga	
Eldoret Municipality Block 2/158/1	Samuel Kihuga	Charge to Barclays Bank of Kenya Limited
Eldoret Municipality Block 2/159/1	Samuel Kihuga	Charge to Barclays Bank DCIO for shs. uncertain
Eldoret Municipality Block 2/189	Samuel Kihuga Esron Kania Daudi Njuki	
Eldoret Municipality Block 5/225/1	Samuel Kihuga	
Eldoret Municipality Block 15/1724	Samuel Kihuga	
Eldoret Municipality Block 15/1632	Samuel Kihuga	
Kapsaret/Kapsaret Block 1(Yamumbi) 74	Samuel Kihuga	Charge to Tabithi Finance Company Limited
Eldoret Municipality Block 9/17 Boarder Farm/79	Kihuga Chege Muchiku Chege	
Eldoret Municipality Block 9/17 (Boarder Farm) 203	Phylis Njoki Kihuga Kihuga James	

	Chege	
Eldoret Municipality Block 12/184	Samuel Kihuga	
Eldoret Municipality Block 7/55	Samuel Kihuga	Charge to Barclays Bank International Limited
Trans-Nzoia/Kaisagat/125	Samuel Kihuga	
Laikipia/Daiga/Ethi Block 2/2050	Kihuga James Chege	
Ngobit/Supuko Block 111/1236	Kihuga James Chege	
Murang'a Loc.3/Mungaria/495	S. Kihuga Gatami	
Kiambu/Dagoretti/Kangemi/S.175	Samuel Kihuga	

45. From the above matrix, net intestate estate means estate of a deceased person in respect of which he or she has died intestate after the payments of the expenses, debts and liabilities. From this definition, as at the time or writing of primary final judgement on this intestate estate, there are certain material evidence which was never submitted on by the parties regarding issues of succession affecting both estates of the deceased. The non-disclosure issues are matters which the Administrators must resolve essentially for good order to establish the net intestate estate capable of being shared out to the beneficiaries. They cannot ride on a general protocol in so far as identification of the shares of the deceased capable of being devolved to the beneficiaries. As reflected from the above text and context on particulars of registrable interest, some of the titles are yet to be discharged from key financial institutions. I am of the view that the Court is only mandated to distribute the net intestate estate taking into account the number of children survived of the deceased. My reading of some of the proposals which were made by the Administrators on sale of the deceased's assets fundamentally, it is not the High Court's duty to order for the sale of any assets when issuing

Certificate of confirmation of Grant. What the decree contained in the confirmed Grant does is to empower the personal representatives to distribute the assets and the Court has nothing to do in giving directions on matters of administration of the estate like survey or which property is to be sold to pay off any liabilities or debts incurred by the deceased during his or her lifetime. It is trite that the personal representative's role is to manage the estate for the benefit of the beneficiaries to the estate and they can only sell the assets if it is necessary to meet the core objective of distributing the proceeds to the beneficiaries but that power is only exercisable with leave of the Court. The confirmed Grant which is the final judgement of the court in succession matters first and foremost, gives the personal representatives to distribute the estate to the beneficiaries and not to sell the assets. This is a question which may need to be revisited as there were some proposals to that effect if indeed its effect is likely to occasion prejudice or injustice to the distribution of the estate.

46. One other aspect is for the Administrators to align the Certificate of Confirmation of Grant with the topographical and evaluation survey by the County Surveyor with the shared formulation in percentages as the form of metrics of distributing the equal shares to the beneficiaries under section 38 of the Law of Succession Act. From the date of delivering the final judgement by this Court on October 11th 2024, the law requires the Administrators or personal representatives duly appointed under section 66 of the Law of Succession Act to complete the administration of the estate within 6 months of the grant of the letters of administration or such longer times as the court may allow. They also have an obligation by law under section 83(g) of the Law of Succession Act to produce to the probate court a full and accurate inventory of the assets and liabilities of the deceased as well as a full and accurate account of all the dealings therewith and the complete administration.

47. I have restated elsewhere on the decisions I have made to this intestate estate and let me re affirm once more that the deceased left behind children but no spouse. The property which I describe as net estate and now as outlined in the basic inventory provided by the County Surveyor is inherited by the children equally under section 38 of the Law of Succession Act as read with Article 27(4) of the Constitution. From the various status conferences held by the legal counsels, the administrators and beneficiaries are alike. One thorny issue remains the prime property in Eldoret Municipality Block 4/4 (Expired Lease) valued at Kshs. 509,800,000.00. This property in practical terms if divided into equal shares, it might diminish its economic value and subsequently land use purpose and objectives. It is an acknowledged fact that one of the beneficiaries by the name Morris has had occupational rights and his matrimonial home duly established in a portion of the aforesaid asset. In the fair and proportionate sharing, it is the duty of the Administrators to resolve what measurements is to be excised from the larger acreage for the sole purpose of sustaining the legitimate interest acquired over time by one of their own by the name Morris. It is never therefore the business of this court to come up with a formula likely to infringe the doctrine of equity in the distribution of the assets of the deceased.

48. The application of equity in intestate estate distribution focuses on fairness and equal division of the shares capable of being devolved to the beneficiaries even when the law is unclear or the customary laws are complex. I bear in mind in dictum in **Rono Vs Rono (2005) AHLR 107 (KECA 2005)** which demonstrate how the court use equity to address disputes in succession matters arising from statutory distribution rules ensuring fair outcomes for all the beneficiaries including multiple widows and their children and may involve evidence and judicial discretion for a just settlement. In the ordinary sense, equity means fairness, justice, morality, fair play and equality etc. In this Succession Cause, any beneficiary asserting some equitable right or remedy in their sharing of

the estate must show that his or her claim has ancestry foundation. In this sense, the assertion by the beneficiaries who occupy part of this prime property, led evidence that, that is the only place he has lived and calls home and therefore beseeching his siblings to consider his plea of getting a larger share of that particular asset. There is some rigidity in view of the characteristic of the asset being described as prime in terms of value and other features compared with the asset portfolio. It is now clear from the valuation report in the strict legal rules of property appreciation and land economics that the highest value in Kenya standards is the so referenced Eldoret Municipality Block 4/4 in comparison with the rest of the intestate estate assets. It is therefore the Administrators to consider the unique circumstances of the case of one of their own Mr. Morris by looking at the value of the assets he is conceding to forego *vis a vis* the share he is to be allocated within the aforesaid asset so that the distribution can achieve a fair result. It is not for this Court to exercise discretion by jerry picking any portion of the intestate estate so as to address the contention by Mr. Morris.

49. The doctrines of this Court on Succession disputes and inheritance are now well settled and made us uniform almost as those of the Common Law laying down fixed principles on distribution of the intestate estate but taking care that they are to be applied according to the circumstances of each case. Hence the maxim *Equity is not a Computer. Equity operates on Conscience but is not influenced by sentimentality*.

50. In my considered view, on this inheritance rights of this intestate estate, the issues of fairness, gender equality calls for the administrators to be guided by the substance over form on the matrix of distribution. It is therefore necessary for them to look at the spirit of the Certificate of Confirmation of Grant and not the letter of it particularly concerning the application of the concept of equal shares under Section 38 of the Law of Succession Act. As much as one of the beneficiaries has had occupational rights recognizable both in the principles and objectives of the Succession

Act, but that should not be confused with devolution of inheritance rights from the deceased to his/her surviving children.

Whether the Applicants are entitled to an order for stay of execution pending the intended Appeal?

51. The general rule governing the grant of an order of stay of execution is that the applicant must demonstrate the likelihood of an irreparable substantial loss. I note that the applicants premised their application on Rule 49 of the Probate and Administration Rules. Their main prayer is for this Honourable Court to order stay of execution or implementation of the part of the judgement dated 11th October 2024 and in particular Grant an order barring and inhibiting the registration of Grant and Transmission and/Transfer of parcel No. ELDORET MUNICIPALITY BLOCK 12/184 pending the hearing and determination of the intended appeal.

52. Whereas Rule 63 (1) of the Probate and Administration Rules has not cited Order 42 Rule 6 of the Civil Procedure Rules as one of the orders of the Civil Procedure Rules which apply to Succession causes, Rule 49 which is among the provisions invoked by the Applicants, is in my view wide enough to cover the present application and entertain a remedy of stay of execution of a judgment or decree in succession proceedings. Rule 49 of the Probate and Administration Rules provides that:

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

53. **Article 159(2)** of the Constitution which provides that,

> *"In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation,*

mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted".

54. In addition, the court may draw upon the wide powers in Section 47 of the Law of Succession Act to entertain any application and to determine any dispute under the Law of Succession Act. I need not state that, the court may, in appropriate instances, draw upon its inherent jurisdiction to grant appropriate orders under Rule 73 of the Probate and Administration Rules in order to meet the ends of justice and to prevent abuse of process of the court. These elegant provisions of ''*existing law*'', are in perfect conformity with the Constitution especially the strict command in Article 159 of the Constitution that courts of law should strive to administer substantive justice.

55. An Apt borrowing from the Civil Procedure Rules, the applicants herein have filed a memorandum of appeal and notice of appeal and thus clothed with the *locus standi* to apply for stay pending appeal.

Substantial loss occurring

56. Stay of execution pending appeal is a discretionary power but, which must not be exercised on whims, but judiciously; on defined principles and the facts of the case. The objective of stay of execution is to prevent substantial loss from befalling the applicant; ordinarily, it is to prevent the appeal from being rendered nugatory. Such is lawful and reasonable reason to limit the respondent's right to immediate realization of the fruits of judgment. In the case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto *[2012]* eKLR** the Court held that: -

"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party

in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

57. With respect to the question of substantial loss, in the event the appeal succeeding, my answer is in the negative. The fruits of judgment here have a shared value and each has a right to property, to secure socio-economic and cultural rights. The rights which accrue on inheritance devolve from the owner who is the wealthy creator but for reason of his or her death, his or her children right of inheritance is triggered by law. The justice of the case must be looked holistically and not individually in situations sometimes which are not for the interest of justice but to meet the sentimentality of a few or one of the beneficiaries. There has got to be a balance between the rights of the majority or some of the beneficiaries against a few or one whose desire is to re-litigate for eternity and deny or limit the rights to property to accrue to the other beneficiaries. It is now widely accepted that the litigation approach in Succession matters is distinctively different from the realm of Criminal and Civil Law. Though the court has an absolute and unfettered discretion as to the granting or refusing of a stay, I hold a strong view that is one branch of law that probate courts should trade carefully to grant leave and stay of execution of the judgement. There must be exceptional circumstances demonstrated by the Applicant why the Certificate of Confirmation of Grant should not be executed by the Administrators by distributing the shares intestate estate to the beneficiaries. The Applicant has failed to demonstrate the condition precedent for substantial loss.

58. On the issue of delay, the Applicants filed their Notice of Appeal on 22nd October 2024, eleven days after delivery of the judgement on 11th October 2024 and filed the present application on 28th October 2024. The Court is satisfied on the evidence before it that the application was brought promptly and without unreasonable delay.

59. On the issue of security, it is not in dispute that the Applicants are beneficiaries of the intestate estate of the late Tabitha Waithera Kamau **In re Estate of Richard Kigondu Kigera (Deceased) (Succession Cause 192 of 2013 & 114 of 2022 (Consolidated)) [2024] KEHC 16277 (KLR),** the Court held that: -

Stay of execution may be granted where the court is satisfied that substantial loss will result if the order is not granted, the application has been brought without delay. The judgment was delivered on 18th September and the application is dated 29th October. The case is one of succession thus there is no need for provision of security. Even though the respondent has argued that the court has become functus officio, the issue of stay may be determined by this court in light of the relevant provisions of the Civil Procedure Rules which are applicable in succession causes. Given the nature of the case, and the judgment being challenged, it would be a waste to deny the orders since the subject matter will be extinguished for purposes of the appeal.

60. For those reasons and in the premises, based on the law, judicial precedents and analogy drawn underpinned in the affidavit evidence under the record, the following orders are hereby made in consonant of the findings of this Court: -

a) *An order be and is hereby made to struck out the summons application for leave and stay pending appeal as filed by the firm M/S Tum & Associates Advocates for being in violation of Order 9 Rule 9 of the Civil Procedure Rules and further in absence of any legal consent between the previous law firm and the take over new firm of lawyers as prescribed by law.*

b) *That in consonant with clause (a) on the merits of the application for leave and stay be and is hereby denied.*

c) *That the Administrators revisit the decimal percentage model proposed on sharing of the assets with a view to effectuate it based on the Surveyor's Report by making it more literal and practical in*

adopting the one eighth (1/8), one quarter (1/4), one half (1/2), an acre (1) etc.

d) *That the administrators in compliance with clause (c) shall be required if need be to occasion a review to the final orders of the court by looking at the substance of the inheritance rights to determine what constitutes fairness in the law given their numbers and the characteristic of the asset survived by the deceased.*

e) *That the Valuation Report be domesticated by the Administrators in the review of the distribution of the estate with a view to achieve fair and proportionate sharing of the estate underpinned in the basic structure of the impugned judgment of the Court 11th October 2024.*

f) *That the Administrators undertake a forensic audit to affirm the net estate of the deceased capable of being distributed given the prima facie evidence that some of the titles are still charged to the respective financial institutions meaning that a discharge of charge is yet to be issued.*

g) *That the joint shares of both Tabitha Waithera (deceased) and Samuel Kihuga (deceased) be distinctively identified as defined in Succession Cause No 85 of 2007 and Succession Cause No 34 of 2007 to avoid duplication in the distribution matrix.*

h) *That the singular asset referenced as Eldoret Municipality Block 4/4 Expired Leased cannot be available for distribution until the lease is renewed and the administrators to be intentional not to necessarily combine its shares with the rest of the assets for the very reason that the equitable principles might not combat discrimination in inheritance of that asset.*

i) *That pursuant to Sections 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules as Read with Rule 73 (1) of the Probate and Administration Rules, a necessity has*

arisen for the Administrators to occasion any such amendment to the Certificate of Confirmation of Grant to meet the ends of justice.

j) *The Costs of this application be in the cause.*

k) *A final status conference tailored on the progress made on transmission of the estate shall be held on 15th December, 2025.*

l) *Orders accordingly.*

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF OCTOBER 2025

.....

R. NYAKUNDI

JUDGE