

**IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E004OF 2025
(CORAM: WARSAME, MATIVO &GACHOKA, J.J.A.)**

BETWEEN

**LEAH CHELIMO CHEPKWONY.....1ST APPELLANT
PHILIP CARLOS KEMBOI.....2ND APPELLANT**

VERSUS

**JEPTARUS CHEPKWONY.....1ST RESPONDENT
ANCHALINA SENGE CHEPKWONY.....2ND RESPONDENT**

AND

**KIMELI ARAP MASAN.....1ST INTRESTED PARTY
KIPKOSGOEI ARAP MOROGO.....2ND INTRESTED PARTY**

(Being an application for stay of execution of the order for the distribution of the estate of the late Kengu arap Chepkwony as per the certificate of confirmation of grant dated 21st February 2011, and application for leave to appeal against the ruling delivered on 25th October 2024 in Eldoret HCC Succession Cause Number 343 of 2009, in the matter of the estate of Kengu arap Chepkwony)

******* RULING OF THE
COURT**

1. **Philip Carlos Kemboi and Philip Carlos Kemboi** (the applicants) have approached this court by their application dated 8th january 2025 essentially seeking two substantive reliefs, namely

a) pending the hearing and final determination of the appeal by the applicant against the entire ruling of the trial Judge, Justice R. Nyakundi delivered on 25th October 2024, there be an order staying the execution of the distribution of the estate of the late Kengu Arap Chepkwony in terms of the certificate of grant dated 21st February 2011 in Eldoret HCC succession cause number 343 of 2009, in the matter of the estate of the late Kengu arap Chepkwony.

b) leave to appeal to this Court, against the entire ruling delivered by Nyakundi J on 25th October 2024 in Eldoret HCC succession cause

number 343 of 2009, in the matter of the estate of the late Kengu arap Chepkwony.

2. The application is premised on Sections 3A (1), (2) and 3B(a) of the Appellate Jurisdiction Act and Rules 1(2) 4, 5, 31, 41, 42(1) & 46 of the Court of Appeal Rules, 2022. It is supported by the grounds listed on the face of the application and the 1st applicant's supporting affidavit sworn on 8th January, 2025.
3. The background to the application is that the 1st applicant moved the superior court vide summons for revocation of grant dated 7th March, 2012 seeking to have the grant issued to the respondents herein (Jeptarus Chepkwony and Anchalina Senge Chepkwony) on 1st December 2009 revoked on grounds, *inter- alia*, that the proceedings to obtain the grant were defective in substance since the purported will relied on in making the grant was not proved and/or was obtained through fraud and coercion.
4. The respondents opposed the application vide replying affidavit dated 29th May, 2012 in which they averred that the late Kengu Arap Chepkwony made a will prior to his death but the executors of the will were unwilling to be executors. On 16th November 2010, the respondents were issued with a grant which was confirmed on 21st February 2011. On 24th November 2011, the transfer by the personal representatives to the persons entitled under a will or on intestacy was lodged at the District Lands Registry in respect of **Nandi/Kipkaren Salient/228 and 364**. After considering the summons for revocation, vide ruling delivered on 20th December, 2023, Nyakundi J. held that the applicants failed to discharge their burden of proving that the will was invalid and that the respondents had concealed material facts.
5. Aggrieved by the said decision, by an application dated 19th January 2024 the applicants sought leave to appeal against the ruling delivered on 20th

December, 2023 from the trial court. The application was opposed by the respondents. After considering the parties' arguments, vide ruling delivered on 25th October 2024, the learned judge held that the applicants were guilty of laches and that no irreparable harm would be suffered considering the subject matter of the dispute. Aggrieved by the said ruling, the applicants filed a notice of appeal and are now before this court seeking to stay the distribution of the deceased's estate citing the following grounds:

- (a) The applicants have an arguable appeal, since the dispute was determined without affording them an opportunity to articulate their objection appropriately and therefore they run the risk of losing their inheritance.***
- (b) The intended appeal has high chances of success and shall be rendered nugatory if the respondents are allowed to proceed with the distribution of the estate, they will be evicted from their lawful inheritance which is the land they call home.***

6. In opposition to the application, the respondent swore the replying affidavit on 29th January 2025 deponing that the application is a ploy to further delay the conclusion of the succession proceedings with the sole intention to continue benefitting from the lion share of the deceased's estate at the expense of other beneficiaries, and, that the applicant has not demonstrated the irreparable loss they stand to suffer should the order they seek not issue.
7. In support of the application, the applicants' counsel reiterated the contents of the affidavits in support of the application and maintained that there is need to stay the execution to afford the applicants their day before this Court.
8. In opposition to the application, the respondents' counsel Ms. Isiaho anchored her arguments on Order 42 rule 6 of the Civil procedure rules, 2010 instead of the Court of Appeal Rules, 2022 which was a misdirection on her part rendering her arguments to be of no consequence. Counsel also submitted that the respondents have been greatly prejudiced by the failure to utilize their rightful

share awarded to them by the deceased for 12 years during the pendency of the applicants' objection proceedings which she termed as a delaying tactic.

9. The starting point in addressing this application is Rule 41 of the Court of Appeal Rules, 2022, which provides:

(1) In a civil matter-

a. where an appeal lies with the leave of the superior court, application for such leave may be made-

- i. informally at the time when the decision against which it is desired to appeal is given; or***
- ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;***

b. where an appeal lies with the leave of the Court, application for such leave shall be made-

- i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or***
- ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.***

10. Notably, the above provision clearly stipulates timeframes within which a party seeking leave must adhere. Nyakundi, J. delivered the impugned ruling on **25th October 2024** in which he declined to grant the applicant leave to appeal against his decision made on 20th December 2023. Rule 41 (1) b) is couched in mandatory terms. The applicant was mandatorily required to approach this Court for leave to appeal within 14 days of the refusal by the High Court. The application before us is dated 8th January 2025, long after the 14 days had lapsed. Therefore, the instant application seeking stay of execution of the ruling on **25th October 2024** is incurably defective and it has no legs to stand on. The applicants never sought extension of time under rule 4 of this Court's Rules. Despite this glaring omission, the applicants approached this Court seeking leave to appeal and stay. Their application was to say the least, dead on arrival. The

effect is that there is no basis upon which the two prayers sought can be granted. Accordingly, the application dated 8th January 2025 fails. It is dismissed with costs to the respondents.

Dated and delivered at Eldoret this 28th day of November 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.

.....
JUDGE OF APPEAL

*I certify that this is
a True copy of the
original
Signed*

DEPUTY REGISTRAR

