

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO E031 OF 2023

IN THE MATTER OF THE ESTATE OF THE LATE CHEBOCHOK MITEI

ALIAS CHEBOCHOKA MITEI (DECEASED)

SAMMY KIPKOECH CHERUIYOT.....1ST

PETITIONER/APPLICANT

VERSUS

ESTHER CHEPKURUI LELEI.....1ST OBJECTOR

DAVID MALAKWEN TUIKONG.....2ND

OBJECTOR

Coram: Justice R. Nyakundi

M/s Tum & Associates Advocates

M/s Keter, Nyolei & Co Advocates

M/s Kitiwa & Partners Advocates

RULING

1. What is pending before this Honourable Court is Summons dated 1st October 2025 brought pursuant to section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules and Rule 41 (a) of the Court of Appeal Rules in which the 1st Petitioner/Applicant is seeking the following orders: -

- a. *That leave be granted to the firm of TUM & ASSOCIATES ADVOCATES to come on record on behalf of the Petitioner/Applicant.*
- b. *That this Honourable Court be pleased to order that there be stay of execution and/or implementation of the Judgement dated 9th September 2025 and/or grant an order barring and inhibiting the registration of the Certificate of Confirmation of Grant, pending the hearing and determination of the intended appeal.*

- c. *That leave be granted to the Petitioner to file an appeal to the Court of Appeal of Kenya against the Judgement of this Honourable Court dated 9th September 2025.*
2. The Application is grounded on the supporting annexed affidavit dated 1st October 2025 sworn by Sammy Kipkoech Cheruiyot who deponed as follows;
- a. *That I am the 1st Administrator of the Estate of the late Chebochok Mitei Alias Chebochoka Mitei representing the 1st House.*
- b. *That this Honourable Court delivered Judgement dated 9th September 2025.*
- c. *That being dissatisfied with the said decision, I intend to file an appeal and I have filed a Notice of Appeal.*
- d. *That I have also written a letter to the Deputy Registrar High Court – Family Division requesting for certified typed proceedings in respect of the Estate herein for purposes of the appeal.*
- e. *That I pray that this Honourable Court do grant me leave to file an Appeal to the Court of Appeal against the decision delivered on 9th September 2025.*
- f. *That my grounds of appeal are meritorious, arguable and weighty as they raise substantial questions of fact and law.*
- g. *That I have instructed the firm of TUM & ASSOCIATES ADVOCATES to come on record on my behalf.*
- h. *That I pray that this Honourable Court d grant leave to the firm of TUM & ASSOCIATES ADVOCATES to come on record on my behalf.*
- i. *That the beneficiaries of the 1st House and myself would stand to suffer irreparable harm and injury if the said judgement is implemented pending the hearing of the appeal.*
- j. *That if the said implementation of the decision is not stayed and set aside then the appeal will be rendered nugatory.*
- k. *That the Objectors/Respondents will not be prejudiced in any way should the orders herein be granted as prayed.*
- l. *That this application has been brought promptly in the best interests of justice and fairness.*

m. That justice will be served if the instant application is allowed as prayed and orders sought herein be granted.

Replying Affidavit

3. The Summons is opposed by way of Replying Affidavit dated 4th November 2025 sworn by DAVID MALAKWEN TUIKONG who deponed as follows: -

- a. That I am the 2nd Administrator of the estate of the deceased appointed to represent the 2nd house of the deceased.*
- b. That I swear this affidavit in opposition to the application dated 1/10/2025 filed by the Petitioner/1st Administrators particularly prayer number 2 of the application.*
- c. That the mere filing of an appeal does not entitle a party to an order of stay of execution and or implementation of the judgement of the court and registration of the certificate of confirmation of grant.*
- d. That as found by the court the deceased was polygamous and left beneficiaries named in the two houses.*
- e. That the deceased owned one property being Moi's Bridge/Ziwa Block 9 (Lemorungeny)/268 measuring approximately 32 acres.*
- f. That by this judgement, the court distributed the estate among the children of the deceased and widow in equal shares of 2.5 acres each.*
- g. That the members of the 1st house led by the applicant have been in occupation of a lion's share of the estate measuring 26 acres while the 2nd house only utilizes a portion measuring 6 acres which is grossly unjust.*
- h. That the applicant and members of the 1st House do not wish to have the estate distributed as ordered by the court to perpetuate an injustice on the members of the 2nd House.*
- i. That as a matter of fact there was piped water which emanate from a stream in a portion occupied by one son of the 1st House being Joseph Kipkosgei Cheruiyot. That water was disconnected and the 2nd House now have no access to it.*

- j. *That further a portion the 2nd House used to use as grazing land for its cattle was sprayed with strong herbicides by members of the 1st House to stop the grazing of animals and the area also blocked.*
- k. *That I pray that as a way to stop further injustice to us, the court's judgement be implemented by registering the grant and certificate of confirmation and the land be surveyed by government surveyors to separate the portion of each named beneficiary with an order that there be no transfers to any third parties pending the determination of the appeal.*
- l. *That if the above proposal is accepted, no prejudice will be suffered by any party as the land would still be available for re-distribution in the event the appeal succeeds, a very unlikely event.*

Analysis and Determination

4. I have read and considered the summons and the replying affidavit in opposition of the same. There are three (3) issues manifest for determination by this Honourable Court?
 - a. *Whether leave should be granted to the firm of Tum & Associates to come on record?*
 - b. *Whether the Applicant should be granted an order of stay of execution and/or implementation of the judgement dated 9th September 2025 pending Appeal?*
 - c. *Whether leave should be granted to the Appellant to file an appeal?*

Whether leave should be granted to the firm of Tum & Associates to come on record?

5. The applicable law on this issue is Order 9 Rule 9 of the Civil Procedure Rules which 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.”

6. The effect of this provision of Order 9 rule 9 of the Civil Procedure Rules is that after judgment is entered, any advocate wishing to take over legal representation 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. The reasoning behind the provisions of Order 9 rule 9 of the Civil Procedure Rules was articulated in the case of **S. K. Tarwadi Vs 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....”

7. Similarly, in the case of **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.

8. The court further rendered in the case of **Tobias M. Wafubwa Vs Ben Butali (supra)** 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 Petitioner/Applicant who is an Appellant in the Draft Memorandum of Appeal. The Applicants had sought an order of stay of execution or implementation of the judgement dated 9th September 2025 and/or grant an order barring and inhibiting the registration of the Certificate of Confirmation of Grant pending the hearing and determination of the intended appeal. The above circumstances fall squarely on the Court of Appeal decision cited above.

9. On perusal of the summons and the Affidavit of Service dated 3rd November 2025, the firm of Tum & Associates Advocates served the firm of Keter, Nyolei & Co Advocates and Kittiya & Partners Advocates with the said application for leave. Specifically, the service was effected via email to both law firms with the attachments included. Taking into context this service, the firm of Tum & Associates Advocates complied with the leave to come on record for the applicant for it has satisfied the requirements of Order 9 Rule 9 of the Civil Procedure Rules.

Whether leave should be granted to the Appellant to file an appeal?

10. This issue will be discussed taking into context the necessity of leave to appeal in Succession cases. 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. There remains an ongoing divide among leading commentators, scholars, and practitioners. One group maintains that obtaining leave to appeal in succession matters is necessary and they advance two primary reasons to support this position. 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. ”

11. 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]

12. 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.”

13. Even as this debate continues, it is my view that the real emphasis should be on the factors a court ought to evaluate when deciding whether to grant or deny 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]

14. According to the dictum above, 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. 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.”

15. Moreover, Article 164(3) (a) of the constitution provides that, “3) *The Court of Appeal has jurisdiction to hear appeals from the High Court.*” These provisions 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

16. The Petitioner/Applicant has expressed grievance on the decision of this court vide a ruling delivered on 9th September 2025, wish to litigate in the Court of Appeal and he has further, annexed the draft memorandum of appeal which raises triable issues to be adjudicated upon. I note that the Applicant deponed that the grounds in the draft memorandum of appeal are meritorious and that irreparable harm will flow if the judgment is acted upon in the absence of a stay. The 2nd Administrator does not dispute the Applicant’s right to appeal; rather the 2nd Administrator’s case relates to whether a stay should be granted. In light of the right of appeal enshrined in the Constitution, I grant the applicants leave to experience the appeal tour. Accordingly, I grant the applicants leave to file appeal within the prescribed time for appealing commencing today.

Whether the Applicant should be granted an order of stay of execution and/or implementation of the judgement dated 9th September 2025 pending Appeal?

17. The standard principle for granting a stay of execution is that the applicant must show a prima facie case of suffering substantial and irreparable loss. I observe that the applicant has based his application on Rule 49 of the Probate and Administration Rules. The order of stay of execution and/or implementation sought relate to the judgement of the Court dated 9th September 2025. 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 Applicant, 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.”

18. Further, the court is empowered under Section 47 of the Law of Succession Act to hear any application and resolve any dispute arising under the Law of Succession Act. It is also worth noting that where appropriate, the court may invoke its inherent jurisdiction under Rule 73 of the Probate and Administration Rules to issue orders necessary to achieve justice and prevent abuse of the court process. These substantive provisions of the “existing law” are fully aligned with the Constitution in particular Article 159, which requires courts to prioritize substantive justice. Similarly, by adopting principles from the Civil Procedure Rules, the applicant, having already filed a memorandum of appeal and a notice of appeal, possess the requisite locus standi to seek a stay of execution pending the determination of the appeal.

Substantial loss

19. A stay of execution pending appeal is a discretionary remedy, but it must be exercised carefully and not arbitrarily guided by established principles and the specific circumstances of each case. The purpose of a stay is to shield the applicant from suffering substantial loss and generally to ensure that the intended appeal is not rendered nugatory. This constitutes a legitimate and reasonable basis for temporarily limiting the respondent’s right to promptly enjoy the fruits of their judgment. In the

case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR** the Court held as follows: -

“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.”

20. I have read and considered the Applicant’s affidavit together with the 2nd Administrator’s replying affidavit. From my evaluation, the following key points emerge: the judgment delivered on 9th September 2025 distributes the estate among the identified beneficiaries and provides for confirmation of the grant. The 1st House, to which the Applicant belongs, contends that implementing the judgment pending appeal will render the appeal nugatory and cause irreparable harm to its beneficiaries. On the other hand, the 2nd House, represented by the 1st Objector, demonstrates that it has been occupying a significantly smaller portion of the estate on the ground and raises allegations of obstruction, including disconnection of water supply and spraying of herbicides on grazing areas. It asserts that delay in registration and survey has continued to perpetuate injustice against its members. Consequently, the 2nd Administrator seeks immediate implementation of the judgment, survey by government surveyors and an order restraining transfers to third parties. There is therefore a clear competing risk of prejudice on both sides: The Applicant fears that implementation will undermine the effectiveness of the intended appeal, while the 2nd Administrator opines that further delay will sustain existing inequalities and frustrate the rights of the beneficiaries.
21. Taking into consideration the competing interests in this Succession Cause, I am of the considered view that the Applicant has not demonstrated that the appeal will be rendered wholly nugatory if the judgment is implemented in the short term provided protective measures are put in place. The risk of irreparable prejudice from registration alone

is not established to the high degree required to justify a stay of implementation of the judgment and registration of the certificate of confirmation of Grant. I take note that whether the intended appeal is arguable or not cannot be determined in such circumstances. It was upon the Applicant to show that he has an arguable appeal but he has not done so. There is therefore no good reason advanced to warrant staying execution and/or implementation of the judgement of this court dated 9th September 2025.

22. In view of the foregoing, I do find that this application is partially merited and the same is allowed as follows: -

a) That leave be and is hereby granted to the firm of Tum & Associates Advocates to come on record on behalf of the Petitioner/Applicant.

b) That leave be and is hereby granted to the Applicant to appeal the decision of this Court to the Court of Appeal in accordance with the applicable rules.

c) That the prayer of stay of execution and/or implementation of the judgement of this court dated 9th September 2025 is hereby declined.

d) That the costs shall abide the outcome of the appeal.

23. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA CTS AND EMAIL AT ELDORET
THIS 2ND DECEMBER 2025**

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**R. NYAKUNDI
JUDGE**