



**In re Estate of Francis Kimutai Too alias Francis Kimutai Kiptoo (Deceased)
(Succession Cause E124 of 2023) [2026] KEHC 74 (KLR) (13 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 74 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E124 OF 2023
RN NYAKUNDI, J
JANUARY 13, 2026**

**IN THE MATTER OF THE ESTATE OF FRANCIS KIMUTAI
TOO ALIAS FRANCIS KIMUTAI KIPTOO (DECEASED)**

BETWEEN

**DORCAS CHEPKORIR TOO 1ST APPLICANT
MARK MELI TOO 2ND APPLICANT
GIDEON KIPKOECH MUTAI TOO 3RD APPLICANT
CAROLINE JEROP TOO 4TH APPLICANT
FRIDAH CHEPCHIRCHIR TOO 5TH APPLICANT**

AND

CELESTINE CHEPCHIRCHIR RESPONDENT

RULING

1. What is pending before this court is the applicants' Notice of motion dated 15th April, 2025 brought under the vacation rules in which they seek to stay the proceedings of this court and set aside the ruling of this court delivered on 2nd April, 2025 pending the hearing and determination of an intended appeal.
2. The grounds supporting the application are that they are aggrieved by the decision of this court and have since lodged an appeal dated 8th April, 2025. That in their quest for the opinion of this Honourable Court, the applicants applied for certified copies of proceedings and ruling in Eldoret High Court in Succession Cause No. E124 of 2023, vide a letter dated 7th April, 2025, which they are yet to receive for preparation of the record of appeal. That the applicants are now concerned that the appeal is likely to lose its substratum if the Respondent proceeds with amending the Grant and administering the Estate of the deceased as per the said ruling delivered on 2nd April, 2025 despite



the existence of the appeal. Further that if the said Ruling is effected, the applicants stand to suffer irreparable damage because the same was erroneous both in law and fact.

3. In response, the Respondent filed Grounds of opposition which are captured hereunder:
 - a. The application dated 15th April, 2025 is incompetent, frivolous, vexatious and an abuse of the process of this court.
 - b. The application dated 15th April, 2025 does not seek order of stay pending appeal and therefore the court cannot grant that which is not sought.
 - c. The application is incompetent because no leave has been sought from this court to file appeal No. E030 of 2025.
 - d. The applicant has not demonstrated irreparable loss if stay is not granted.
 - e. The applicant has not provided any security for due performance of decree.
 - f. The issues raised in the memorandum of appeal can be exhaustively handled by this honourable court through a review.
 - g. The application is a delaying tactic to conclude this matter.
4. The parties filed written submissions which are briefly captured herein:

Applicant's submissions

5. Learned Counsel Ms. Chepseba filed written submissions dated 19th June, 2025. Learned Counsel commenced her submissions by outlining the background of the Application dated 15th April 2025, which was filed under vacation rules. Counsel submitted that the Applicants were concerned that the appeal they have lodged before the Court of Appeal was likely to lose its substratum if the Respondent proceeded with amending the grant and administering the estate of the deceased as per the ruling delivered on 2/4/2025 despite the existence of the appeal. She argued that if the said ruling was effected, the Applicants would suffer irreparable damage because the same was erroneous both in law and fact, being non-compliant with Section 66 of the *Law of Succession Act*.
6. In analysing this issue, Learned Counsel submitted on three elements drawn from Order 42 Rule 6(2) of the Civil Procedure Rules, namely: substantial loss, unreasonable delay, and security for performance of the decree.
7. On substantial loss, Counsel relied on the case of *Antonie Ndiaye vs African Virtual University (2015) eKLR*, which defined substantial loss as a qualitative concept. She further cited *John Mwangi Ndiritu Vs. Joseph Ndiritu Wamathai (2016) eKLR* and *Silverstein Vs. Chesoni 2002 1KLR 867*, where Hon. Mativo J. held that substantial loss is the corner stone of both jurisdictions. That substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
8. Counsel submitted that the Applicants would undergo substantial loss if an order of stay of execution was not issued, owing to the fact that the Respondent claimed to be a daughter of the Late Francis Kimutai Too Alias Francis Kimutai Kiptoo, yet the same had not been proven. She argued that the court in dismissing the objectors' objection dated 27th May 2024 had failed to consider submissions regarding paramount issues on the Administration of the Estate and failed to take into proper consideration whether some of the proposed beneficiaries were indeed the biological children of the deceased.



9. Learned Counsel submitted that the Applicants had filed the instant Application within reasonable time, as the judgment was delivered on 2nd April 2025, while the Application for Stay of execution was filed on 15th April 2025, a period of thirteen (13) days from the date of ruling. She relied on the case of Geoffrey Muriungi & Another Vs. John Rukunga M'Imonyo suing as legal representative of the estate of Kinoti Simon Rukunga (deceased) (2016) eKLR, which held that there is no exact measure as to what amounts to unreasonable delay and that delay beyond acceptable limits given the nature of the act to be performed would be considered unreasonable.
10. Finally, as to the security for performance of the Decree Learned Counsel stated that the Applicants expressly stated their readiness and willingness to deposit any form of security for costs as directed by the court for the due performance of the Decree. She submitted that the Applicants had guaranteed to obey the court's directives as far as security for the decree was concerned, provided that an order for stay of execution pending appeal was issued.
11. Learned Counsel concluded that the Applicants had demonstrated that the Application dated 15th April 2025 met the threshold for granting an order for stay of execution of the ruling and proceedings issued in the matter pending the hearing and determination of the appeal as commenced vide a Memorandum of Appeal dated 8th April 2025 in Eldoret Court of Appeal No. E030 of 2025, for the following reasons: the Applicants had sufficiently demonstrated that substantial loss would be visited upon them if the execution of the ruling and subsequent confirmation proceeded; the Application was filed within a reasonable time of thirteen (13) days from the delivery of ruling; and the Applicants had guaranteed to abide by any court directions regarding security for execution of the ruling issued in the matter.

Respondents' submissions

12. Learned Counsel Mr. Kimaru submitted that the application is incompetent together with the appeal lodged for lack of leave from this court to appeal. In the court of appeal decision of Rhoda Wairimi Karanja & Another vs Mary Wangui Karanja & Another (2014 EKLR), counsel noted that the court had made important pronouncements regarding leave to appeal.
13. Learned Counsel submitted that even if the application for stay pending appeal was properly before the court, the applicant would still be required to demonstrate irreparable loss. To merely assert that the substratum of the suit shall disappear was not enough. Counsel noted that there existed a plethora of authorities to the effect that irreparable loss was the corner stone for grant of stay. He relied on Kenya Shell Limited v Benjamin Karuga Kabiru and another (1986) eKLR.
14. Learned Counsel further submitted that if there was a proper application for stay pending appeal, the applicant had to bring herself within the provisions of Order 42 Rule 6 (2), which required demonstration of substantial loss, filing without unreasonable delay, and provision of security for due performance of the decree.
15. Learned Counsel submitted that the application was merely intended to delay the finalization of the cause. It was without merit and he humbly submitted that the same be dismissed with costs.

Analysis and determination

16. Having perused through the application together with the response and submissions, the main question that is up for determination is whether this court can stay its ruling delivered on 2nd April, 2025.



17. Stay of execution is to be granted pending an appeal which is properly and duly filed. That is to say, when a party cannot appeal as of right, the pre-requisites (in this case, leave) have to be met before it can be termed as a valid or proper appeal to be determined on merit. In the case of *Nicholas Stephen Okaka & Charity Njoki Muigai v Alfred Waga Wesonga* [2022] KEHC 1123 (KLR), the court held that:

“The court, in *RWW v EKW* [2019] KEHC 6523 (KLR) considered the purpose of a stay of execution order pending appeal, in the following words: “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

18. Before examining whether the prerequisites for granting a stay have been met, I must address a fundamental question that goes to the competence of this application. The applicants have filed an appeal to the Court of Appeal without first seeking or obtaining leave of this court to do so. The [Law of Succession Act](#) establishes a specific regime for appeals in succession matters. The statute does not expressly provide for appeals to the Court of Appeal from decisions of the High Court in succession causes. Where a statute declares a decision final or is silent on further appeal, the settled principle is that a party must first obtain leave.

19. In *Rhoda Wairimu Karanja & another v. Mary Wangui Karanja & another* [2014] eKLR, Musinga, Ouko & Gatembu, JJ.A. opined on section 50 LSA thus:

“But section 47 of the [Law of Succession Act](#) makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter’s original jurisdiction. Decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of *Makhangu vs. Kibwana* [1996-1998] 1 EA 168 (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters; that under section 47 of the [Law of Succession Act](#), the High Court has jurisdiction on hearing a matter to pronounce decrees or orders; that any order or decree made under this section is appealable under section 66 of the [Civil Procedure Act](#), either as a matter of right if it falls within the ambit of section 75 of the Civil Procedure Rules or by leave of the Court if it did not. It has been said in criticism of this decision that the [Law of Succession Act](#) is a complete code with its own rules and that there would be no justification to import into it provisions of the [Civil Procedure Act](#) and Rules unless expressly permitted under Rule 63 of the Probate and Administration Rules. In short, and speaking generally, the practice alluded to by their Lordships in the above passage, is that where there is no automatic right of appeal an aggrieved party wishing to appeal must seek leave to do so and the granting of leave is a discretionary power. 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. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of the probate and administration dispute. So what is our decision in this application...leave of the High Court to appeal to this Court in succession matters is necessary in the former's exercise of its original jurisdiction.”

20. The applicants filed their notice of appeal and memorandum of appeal without obtaining the jurisdictional prerequisite of leave. An application for stay pending appeal presupposes a valid appeal exists. Where no competent appeal exists because necessary leave has not been obtained, the foundation crumbles. The court would be exercising discretion in a vacuum, protecting nothing of legal substance. The proper sequence is to seek and obtain leave before filing notice of appeal and certainly before seeking a stay. The applicants cannot regularize their position by obtaining a stay while their defective appeal stands on record.
21. Even overlooking this fundamental impediment and considering the application on its merits, I find it unmeritorious. The applicants argue they will suffer substantial loss if the ruling is implemented because the respondent will proceed to amend the grant and administer the estate, rendering their appeal nugatory. They contend the respondent's status as daughter has not been proven and substantial loss will occur if she distributes the estate to persons not entitled. This argument fails to account for what the ruling actually ordered. The ruling did not grant exclusive authority to the respondent. Rather, it appointed two persons as joint administrators: the respondent Celestine Chepchirchir Mutai and the first applicant Dorcas Chepkorir Too. The ruling directed that a fresh grant be issued in both their names and that they file summons for confirmation within forty-five days.
22. The first applicant, who is the widow and mother of the other applicants, is herself one of two joint administrators. She possesses equal authority with the respondent over all estate matters. No significant decision can be taken without her knowledge and consent. No distribution can occur without her participation. The estate cannot be wound up without her concurrence. The very mischief the applicants fear is prevented by the structure of joint administration. The concern that the respondent will act unilaterally to dissipate the estate is unfounded because she cannot act unilaterally. If concerns exist about improper administration, they can be addressed through the first applicant's active participation in administration. She has the legal authority and duty as administrator to ensure proper management. The applicants do not need a stay order to protect their interests. Those interests are already protected by the first applicant's position as joint administrator.
23. The applicants contend the respondent and others should undergo DNA testing and that the court failed to properly consider whether these persons are biological children of the deceased. These may be legitimate concerns, but they do not support this application. On the question of stay, let me state that not every court order is amenable to stay. A stay contemplates something to be suspended, some action postponed. An order directing payment can be stayed because payment can be held in abeyance. An order directing delivery of possession can be stayed because delivery can be deferred. But what is there to stay when the order appoints administrators?
24. The appointment has been made. The order declares that two named persons are administrators and directs a grant be issued accordingly. This is not an executable order requiring parties to take action that can be suspended. It is a declaration of legal status taking immediate effect upon pronouncement. Once the order appointing administrators was made, those persons became administrators by virtue of the order itself. The grant issuance is merely ministerial, giving documentary form to what the order accomplished. The order is not subject to execution that could be stayed.



25. If the applicants succeed on appeal, assuming they obtain leave and the appeal has merit, the Court of Appeal may set aside the order appointing joint administrators and substitute a different order. That is within appellate remedial powers. But pending that determination, this court's order stands and has legal effect. The applicants cannot ask this court to suspend its own order's legal effect through a stay application when what they really seek is reconsideration and reversal of the earlier decision. That is not a stay application's function. That is the function of either a review under Order 45 or an appeal to a superior court.
26. There is also a practical consideration weighing against granting relief. If I stayed the order appointing administrators, what would be the estate's status? The grant initially issued to the respondent alone on 16th October 2024 was superseded by the 2nd April 2025 order appointing joint administrators and directing a fresh grant. If that latter order is stayed, does the original grant revive? Or is the estate left without any administrator? Either scenario would be problematic. If the original grant revives, applicants would be worse off because the respondent would have sole authority. If the estate is left without administrators, it would be in limbo with no one authorized to collect income, pay obligations, or preserve assets. But in this case there is no need for such concern because the estate is not in limbo. There are already two administrators appointed, one of whom is the first applicant herself. The estate has administrators who can perform all necessary functions pending any appeal.
27. This court pronounced itself on the 2.4.2025 in the following language couched in the form of declarations:
- a. The petitioner, celestine Chepchirchor Mutai and the 1st objector, Dorcas Chepkorir Too are hereby appointed as administrators of the estate of Francis Kimutai Too alias Francis Kimutai Kiptoo (Deceased). A fresh grant be issued in their names.
 - b. The new administrators are hereby directed to file summons for confirmation of the fresh grant within 45 days from the date hereof
28. It is from this decision the purported intended appeal has been preferred by some of the beneficiaries in which we appointed the widow to be first among equals as the administrator of the estate to her children and other dependents on matters to do with inheritance of assets survived of the deceased. The import of this relief is anchored under Order 42 Rule 6 (2) of the Civil Procedure Rules. On a case to case basis, there are condition precedents to be fulfilled by an applicant before any such remedy is granted by this court. I am of the considered view that the court in *Reliance Bank Limited (In liquidation) v Norlake Investment Limited (2002) 1EA 227* in which the court made the following observations:
- a. In considering the second limb of the application for stay of execution pending appeal (that is whether the appeal would be rendered nugatory if stay is not granted.) the court is bound to consider the conflicting claims of both parties (See *Oraro and Rachier Advocate v Co-OPERATIVE Bank of Kenya Limited, Nairobi civil application number 358 of 1999*).
 - b. The issue of the balance of convenience or the claims of both sides is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if a stay of execution or an injunction is not granted
 - c. What may render the success of an appeal nugatory must be considered within the circumstances of each particular case as the term "nugatory" does not only mean worthless, futile or invalid but also means trifling. See the *Attorney General v Equip Agencies (Nairobi civil application number 432 of 2001 Clarkson (Insurance Brokers) Limited v South Coast*



Fitness Centre, Nairobi civil application number 204 of 1995. That Bank Limited and another v Invstech Bank Limited and others, Nairobi civil application number 258 and 315 of 1999.

- d. The issues such as a balance of convenience or weighing the claims of both side, do not constitute a distinct and separate head from the two principles applied by the court, but rather they are some of the legitimate elements which the court has to take into account when considering the second principles namely whether an appeal or an intended appeal would be rendered nugatory is a stay of execution or an injunction,
30. First and foremost, there is no sufficient cause why the summons for confirmation of grant has not been filed by the administrators duly appointed by this court. The aggrieved parties are yet to file a review application pointing out grounds stipulated in order 45 Rule 1 of the Civil Procedure Rules as it relates to the impugned ruling of this court. We are told that there will be substantial loss occasioned if stay is not granted, but the question I have for the applicants and intended appellants is what would be lost at this stage of the proceedings when there has been no disclosure on the net assets of the deceased capable of being shared among the beneficiaries. The question of Section 29 of the Law of Succession Act as it applies to the circumstances of this estate is a matter yet to be fully ventilated and some of the worries being raised in the affidavit could easily be addressed during the summons for confirmation by the probate court. On this aspect, the court in Southern Credit Banking Corporation Ltd v Grandways Ventures Ltd and another Nairobi Civil Application number 321 of 2001 observed as follows: “Whether or not the appeal will be rendered nugatory depends on whether or what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved and if damages will adequately compensate the applicant or if the act to be stayed can reasonably be reversed, then it cannot be said that an appeal or intended appeal will be rendered nugatory unless a stay or injunction is granted.
31. For these reasons, I find the application dated 15th April 2025 fundamentally defective. It is premised on an appeal that may be incompetent for want of leave. It fails to demonstrate real prejudice given the first applicant is joint administrator with full authority to protect interests of herself and her children. It amounts to abuse of process by seeking relief that cannot be granted within our procedural framework. The application is hereby dismissed. This being a family matter each party shall bear their own costs.
32. Orders accordingly.

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

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R. NYAKUNDI

JUDGE

