

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC SUCCESSION CAUSE NO.E001 OF 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE JAMES KIMARU  
BUNDOTICH (DECEASED)**

**SIMION CHEPKWONY MARU**

**MELVIN CHEPKEMI MARU .....APPLICANTS**

**VERSUS**

**DANIEL**

**KIPRUTO**

**MARU**

**.....RESPONDENT**

**RULING**

1. The application before this Court is the Notice of Motion application dated 15<sup>th</sup> January 2025, brought pursuant to provisions of **Section 1A** and **3A** of the **Civil Procedure Act**, **Order 22 Rule 22**, **Order 42 Rule 6** and **Order 52 Rule 1** of the **Civil Procedure Rules**. The Applicant seeks the following orders:

- 1) Spent.
- 2) That leave be granted to the Applicants to act in person this cause, Succession Cause No. E063/2021 and intended appeal.
- 3) That this Honorable Court be pleased to grant interim orders for stay of execution of the ruling delivered on

**15/07/2024 by Hon C. Kesse and all consequential orders pending hearing and determination of this application.**

**4) That this Honorable Court be pleased to grant interim orders for stay of execution of the ruling delivered on 15/07/2024 by Hon C. Kesse and all consequential orders pending hearing and determination of the intended Appeal.**

**5) This Honourable Court be pleased to grant leave to the Applicants to file an appeal out of time from the ruling and order of Hon. C. Kesse delivered on 15/07/2024 in Eldoret Succession Cause No. E063/2021 Estate of James Kimaru Bundotich.**

**6) Costs of this application be provided for.**

2. The application is supported by the grounds on the face of the said application and the Supporting affidavit of **Simion Chepkwony Maru**, dated 15<sup>th</sup> January 2025.

3. He deposed that the Applicants and the Respondent are children of the late James Kimaru Bundotich (deceased) who died on 16<sup>th</sup> December 2019. That upon demise of their father, the Respondent herein instituted succession proceedings vide Eldoret CMSUCCC No. **E063/2021** where he was appointed a co-administrator without his consent. That upon institution of the said proceedings, the family had a meeting and directions issued on how the estate will be distributed. That he personally did not attend the meeting because he was not informed and some members of the family who attended

were not satisfied with the minutes adopted since there was biasness and serious discrimination.

4. He further deposed that he was not impressed with the decision passed since some beneficiaries were left out and they introduced strangers to the estate. That subsequently, the Court adopted the report and issued a Certificate of Confirmation of Grant thereof in the absence of all the beneficiaries.
5. He urged that it is imperative that a decision reached by way of family consensus akin to alternative justice system (AJS) must be above board, adhere to human rights principals and must be signed by all concerned parties and not representatives or otherwise.
6. He further deposed that they instituted an application dated 4<sup>th</sup> July 2021 vide the said **Succession Cause No. E063/2021, Estate of James Kimaru Bundotich**; seeking revocation and annulment of the grant that was issued based on the said family agreement and instructed the firm of Seneti Oburu to prosecute the application on their behalf. That the said application was heard and the Honourable Court made a ruling dismissing their application on 15<sup>th</sup> July 2024. That their advocates on record did not update them on the Court's decision and when they pressed for information they were informed that the Court had indicated that it will deliver its ruling on notice.
7. They waited for official communication from their advocates in vain until end of November when they took it upon themselves to visit the Court registry and confirm the status of **Eldoret Succession Cause E063/2021**. The court records revealed that the ruling was delivered way back in July

2024 and this was a surprise to them since they were waiting for communication.

- 8.** He added that apart from the ruling they discovered that the Land's office had already done a verification on the authenticity of the order issued 23<sup>rd</sup> July 2024 vide a letter dated 23<sup>rd</sup> October 2024, that they were also informed that the Respondent's advocate had requested for certified copies of Forms 54 and 41 for purposes of executing transfer forms vide a letter dated 13<sup>th</sup> August 2024.
- 9.** That upon confirming the status of the matter from the court records, they inquired from their advocates why they did not inform them of these developments and that their response was that the ruling was delivered in their absence since the Honorable Court did not issue notices to them or give directions as to when and where the ruling will be delivered.
- 10.** That the Applicants are aware that the statutory period to lodge an appeal has since lapsed and that unless this Honourable Court grants them leave to file an appeal out of time then they cannot do much. That they feel aggrieved by the ruling and order delivered by Honorable C. Kesse on 15<sup>th</sup> July 2024 and wish to lodge an appeal which they humbly believe raises triable issues, is meritorious with high chances of success and unless the orders sought are granted, the appeal stands to be rendered nugatory
- 11.** That the delay in filing the appeal was occasioned by failure of their counsel on record to update them on the ruling and they urged that mistake of counsel should not be occasioned on their clients, that the delay as indicated above is excusable and has been explained and they are willing to abide to

any conditions issued by this Honourable Court and that it is in the interest of justice and fairness that the orders sought herein be granted.

### **Replying Affidavit**

12. The Application is opposed by the Respondent vide his Replying Affidavit sworn on 7<sup>th</sup> February 2025.

13. He deposed that the Applicants were represented by counsel in the main succession cause before the Lower Court by **M/s Seneti Oburu & Co. Advocates** and that the said advocates have not verified the complaints being aired in the current motion as the case should be. That the Applicants are being less than candid when they claim ignorance of the Court ruling as it was uploaded on the platform timeously and in accordance with the standard procedure and that there is no vacuum in the Succession Act and the Probate and Administration Rules on what should happen in the case time lapses.

14. He further deposed that the proceedings in the lower Court relate to the estate of his late father, who is also the father of the Applicants and the property being contested is one whereby his late father had settled his two households separately.

15. He contended that the ruling being impugned simply upheld the arrangement that was prescribed by the deceased in his life time and upheld by the clan, and that throughout the duration of the lower Court case and even after judgment the Applicants have sought to use the numerical numbers as members of the 2<sup>nd</sup> house (16 of them) to disinherit and displace the members of his household, which is the 1<sup>st</sup> house and who are only 6.

That together with members of his household, they have endured terror of physical abuse, destruction of their houses and property that they have had to relocate to safe havens away from the suit land.

- 16.** The Respondent annexed 11 copies of occurrence bookings (OB) made to Kuinet Police Station and Kamukunji Police Station of their various transgression ranging from threat to physically harm, destruction of property, trespass and malicious damage to property and he also annexed copies of P3 issued to him on 11<sup>th</sup> June 2021 which was issued to him in one of the incidents when he suffered physical harm at their instance. He added that the Applicants have also been very hostile to his farming of the portion of land set apart for his household as they continuously chase away tractors and any workers they deploy to work on their farm. He also annexed photographs showing graphically the destruction caused on his house and farm by the Applicants since the year 2021.
- 17.** He maintained that the people being complained about in the supporting affidavit as strangers were all dependents of the deceased who were being supported by him and that situation applies to both his household as well as the 2<sup>nd</sup> household where the Applicants hail from.
- 18.** He further deposed that the Applicants seem kin to blame even their former advocates for failure to advise them of the going on at the Court and that once a grant has been confirmed it must be executed and registered in the lands office to transmit shares to the beneficiaries and there is absolutely nothing wrong with that and that other than the general complaint of being aggrieved by the impugned ruling the Applicants have not even attached a

draft memorandum of appeal to demonstrate the seriousness of their intention to appeal.

19. In the end, the Respondent urged that the application as drawn is misconceived as the Succession Act and Rules do not recognize a Notice of motion as a way of approaching the Court and that the Applicants are using the window for appeal to further their scheme to disinherit and displace members of the 1<sup>st</sup> household who have an equal right to inherit from their late father.

### **Supplementary Affidavit**

20. The Applicants also filed a Supplementary Affidavit dated 23/07/2025 sworn by the 2<sup>nd</sup> Applicant.

21. She deposed that there was communication by way of phone conversation, WhatsApp messages, and SMS between herself and their advocate, inquiring on the delivery of the ruling on the confirmation of grant and that despite these inquiries and constant reminders, the said advocate did not inform them timely of the date and delivery of the ruling and further that because they were under representation by their advocate, they could not access the Court CTS system directly to confirm whether the ruling had been delivered but solely relied on communication from their advocate. She annexed copies of the messages as MCB-6a)-i) and reiterated the contents of her Supporting Affidavit.

22. She maintained that contrary to the Respondent's averments, they are properly before this Honourable Court by way of Notice of Motion, as is

permissible under **Section 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules**, which gives the Court inherent powers to make such orders as may be necessary for the ends of justice.

23. She urged that unless this Honourable Court grants the prayers they seek for leave to file appeal out of time and stay of execution, they stand to suffer substantial loss, as the estate may be fully distributed to the exclusion of them and other beneficiaries. She denied the Respondent's allegations that they have been on a mission to deny them their inheritance; rather, they as part of the 2<sup>nd</sup> household of the deceased, seek only to have a fair and just distribution of the deceased's estate that includes all rightful beneficiaries.

24. She reiterated that they have an arguable appeal which raises serious questions regarding the manner in which the grant was confirmed and the report adopted by the Honourable Court without proper participation of all beneficiaries and maintained that what they seek is not to deny the Respondent his share, but to ensure that the distribution is fair, equitable, and lawful, and that every rightful beneficiary is considered. According to the Applicants no prejudice whatsoever will be occasioned on the Respondent if this Honourable Court allows this Application.

### **Submissions**

25. The Application was canvassed vide written Submissions. The Applicants filed Submissions dated 22<sup>nd</sup> July 2025 while Respondent filed Submission dated 22<sup>nd</sup> October 2025.

### **Applicants' Submissions**

26. In regard to filing of appeal out of time, Counsel for the Applicants cited Section 79G of the Civil Procedure Act. He then relied on the case of **Stecol Corporation Limited v Susan Awuor Mudemb [2021] eKLR** and **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others**. Guided by the said authorities, Counsel submitted that the Court needs to consider the following factors in an application for extension of time to file an appeal: the period/length of delay, the reasons for delay, the degree of prejudice to the Respondent if extension is granted and whether the appeal has arguable grounds.

27. On the issue of delay, Counsel submitted that the period/length of the delay was reasonable and the Applicants acted without undue delay in filing this application. Counsel urged that when the ruling was delivered on 15<sup>th</sup> July 2024, the Applicants were in the dark and only learnt of the same later at the end of the year. Counsel submitted that the Applicants however, upon learning of the ruling from the Court registry which was on 2<sup>nd</sup> December 2024, acted without undue delay in filing the application dated 15<sup>th</sup> January 2025 before this Court which was 42 days late. Counsel relied on the Court of Appeal decision in **Civil Appeal (Application) E359 of 2021; Ngei V Kibe & Another [2021] KECA 243 (KLR)** where the Court found a delay of one year not inordinate and therefore excusable.

28. Regarding the reason for the delay, Counsel submitted that the delay arose because neither the Applicants nor their advocate were served or informed of the date of delivery of the ruling, contrary to the Court's direction that ruling would be on notice. Counsel argued that the failure to lodge an appeal within the statutory period was occasioned as a result of the previous Counsel on

record who failed to update the Applicants on the ruling and the outcome thereof.

29. Counsel added that the delay was not deliberate as immediately they came to the knowledge of the ruling, the instant application was lodged. According to Counsel, it would be unfair and unjust that a mistake of their previous Counsel be visited on the Applicants. Counsel maintained that the Applicant's reasons for delay are valid and further submit that granting the application will not prejudice the Respondent in any way. Counsel urged that the delay is excusable and not so inordinate as to prejudice the Respondent.

30. On the arguability of the appeal, Counsel submitted that the Applicants have an arguable appeal which raises serious, weighty and triable issues for this Honorable Court's consideration with a high chance of success. Counsel urged that their appeal is based on the mode of distribution which was adopted as an agreed report by the Court thus leading to confirmation of then grant, yet the Applicants had not consented to the same adopted report were absent when it was filed. Counsel pointed out that the lower Court adopted the report and issued a certificate of confirmation of grant in the absence of most of the rightful beneficiaries.

31. According to Counsel, the Applicants herein have sufficiently proven the factors the Court considers in allowing an application to file an appeal out of time by providing sufficient reasons and cause.

32. On whether stay of execution should be granted, Counsel cited **Order 42 Rule 6 of the Civil Procedure Rules** and submitted that the application has

met the requisite conditions for grant of stay of execution pending the intended appeal and that they have an arguable appeal with high chances of success and that failure to grant stay of execution of the impugned decision will render the Applicant's intended appeal as nugatory. Furthermore, Counsel submitted that the Applicants have met the 3 conditions as provided for under **Order 42 of the Civil Procedure Rules** to be granted the stay.

**33.** Counsel urged that at the baseline, the Court is called upon to balance the interest of the Applicants seeking to preserve status quo pending hearing and determination of the intended Appeal vis a vis the interest of the Respondent. Counsel submitted that this principle was emphasized by Kuloba, J in **Machira T/A Machira &Co Advocates v East African Standard (NO 2) [2002] KLR 63**.

**34.** With respect to sufficient cause, Counsel submitted that that the Applicants have not only stated, but also demonstrated the loss they would be suffer should stay not be granted. Counsel observed that after delivery of the ruling, the Respondent, without delay, rushed to effect transfer of the suit land and went further to file an application to remove the co-administrator, who was the supposed chosen administrator from the 2<sup>nd</sup> Household and the Respondent herein removed him on the basis that he had refused to sign transfer documents, yet he did not know his confirmed status in the estate at that time. Counsel urged that sadly, the Applicants risk suffering great loss and prejudice that cannot be awarded by damages if stay is not granted as their right to inheritance from their father's estate may be extinguished merely because of the acts of the Respondent.

35. Counsel added that the Applicants have demonstrated the loss they shall suffer which amounts to the risk of losing their lawful share of the deceased's estate, which would amount to substantial loss. Counsel submitted that estate may be transferred to third parties, making reversal difficult and rendering the intended appeal nugatory, if stay is not granted as was firmly stated in the case of **Joel Nderitu Ndiang'ui v Ann Kabura Chomba [2020] eKLR** as quoted in the case of **Aveco Limited v John Joseph Ndungu Mwenja & Partners Ltd & Another [2021] eKLR**.

36. Counsel urged that the Applicants have satisfied the condition that requires the application to be brought without undue/unreasonable delay. According to Counsel, 42 days late amounts to a reasonable delay and therefore the Applicants should not be denied the prayers they are seeking.

37. On the issue of security, Counsel submitted that they are ready and willing to offer any such security binding on them if the Honorable Court so orders. Counsel further submitted that the condition of no security should not hinder the Court's discretion in allowing the Applicants prayer for stay of execution

### **Respondent's Submissions**

38. Counsel for the Respondent began by giving summary of the parties' pleadings on record. Counsel observed that up to the point of making the application for leave to appeal out of time on the grounds that they were dissatisfied with the determination of the lower Court the Applicants failed to disclose which aspects of the judgment they were dissatisfied with by filing a draft memorandum of appeal. According to Counsel, the supporting affidavits are even more revealing of the actual intent of the parties that is

the 1<sup>st</sup> Applicant seems to take issue with his appointment as co-administrator with the Respondent.

**39.** Counsel submitted that it is important to restate that the core function of the succession Court is to; - ascertain the heirs to an estate, the extent of the estate and distribute the same based on consensus or equity. Counsel pointed out that in the instant case parties failed to agree, went for mediation and presented oral evidence and left the issue of distribution to Court.

**40.** Counsel added that by their own admission the Applicants challenged the distribution made by the Court vide an application for revocation made on 15<sup>th</sup> July 2024 and that too did not succeed and birthed the instant application before the Court. Counsel submitted that strangely up to that point the Applicants and their former lawyers were in sync and seemed to be in tandem. Counsel questioned whether the Applicants were vigilant enough because the current application is made more than 6 months after the event. Counsel urged that the delay is excessive and unreasonable.

**41.** Counsel maintained that in seeking to challenge a judgment made after hearing the parties on distribution, the Applicants squandered their right to come to the Court by way of appeal. Counsel argued that revocation perse operates like review in the sense that you approach the trial Court with fresh or additional evidence which you think the Court didn't take into account when it pronounced itself in the first instance.

**42.** Counsel further submitted that motion was opposed by way of replying affidavit sworn by the Respondent, Daniel Kipruto Maru, in which he stated that the impugned decision was made in accordance with the wishes of the

deceased who had settled his two wives separately on the estate and that in his view the application for revocation and for leave to appeal were informed by ego and the sheer numerical strength of the Applicant's household.

**43.** Counsel observed that clearly, the two households have not had the best of relationships and have had disagreements that have taken a criminal angle. Counsel added that intervention by clan members have yielded little and when the trial Court upon hearing them went by the earlier settlements, it was bound to generate disagreements. Counsel submitted that thus narrative does not support the view that the Applicants were not aware of the happenings in Court for the 6 plus months.

**44.** Counsel urged that the Applicants were intent on displacing the Respondent and members of his household by all means and that this current application seems to be part of that scheme. Counsel maintained that the law does not countenance such conduct and it cannot lend its seal of legitimacy to such uncivil enterprise.

**45.** According to Counsel, the Replying affidavit by the Respondent seems to have provoked a supplementary affidavit by the 2<sup>nd</sup> Applicant and that in it the Applicant demonstrates that the blame to communicate with the lower Court lies with their former advocate. However, Counsel argued that she is not clear on whose mobile number was captured by the CTS Platform, which in our view would receive automated messages of all that was happening. According to Counsel, the hullabaloo that there was no notice could only be clarified by the former advocate. In the absence of such depositions, the allegations are hollow and unproven.

46. Counsel submitted that law of succession is a special jurisdiction which only allows limited application of the Civil Procedure. He cited **Rule 63 of the Probate and Administration Rules** on the limited application of **Civil Procedure Act** and Rules of the probate and administration Rules on the importation of the **Civil Procedure Act and Rules**. Counsel cited **Section 50** of the same Act and submitted that application goes beyond the doctrine of exhaustion which frowns upon deployment of alternative remedies when there exist sufficient mechanisms in the primary Act, in this case, the Law of Succession Act, Cap 160. Counsel argued that rules under which the motion is preferred are alien to the succession jurisdiction. They do not fall within the ambit of permissible limited importation of the Civil Procedure Rules under **Rule 63(1)**.

47. Counsel added that **Rule 49 of the Probate and Administration Rules** which has a marginal note "Applications not otherwise provided for" would have come in handy as it provides how any party desiring to approach the Court on any subject, that is not expressly provided for can do so. Further, Counsel submitted that procedure invoked is wrong and the form of the application elected "notice of motion" is also wrong and cannot yield the reliefs sought. All the rules invoked in support of the application are excluded by **Rule 63(1) Probate and Administration Rules**. Counsel urged that Applicants' application is defective in form and substance and should be dismissed with costs.

48. Counsel argued that even in invoking **Article 159 of the constitution of Kenya** on Judicial authority and how it ought to be exercised does not cure the irregularities pointed out. Counsel submitted that it also undermines the

doctrine of exhaustion, which states that before invoking the constitution to aid them, they must have invoked all other available mechanisms before invoking the constitution. In this case, Counsel pointed out that the Applicants failed to approach the lower Court to review its decision or even extend time within which to file the appeal. According to Counsel, the failure is fatal to the application now under consideration. Counsel urged the Court to find the same defective, unprocedural and totally alien to the succession Court and dismiss it with costs.

### **Determination**

49. I have given due consideration to the pleadings and submissions filed in this application. The issue for determination is **whether the Applicants' prayer for extension of time and stay of execution should be granted.**
50. Before delving into the merits of the issues frames herein above, I note that **Messrs Nechessa Maina & Associates** have since filed a Notice of Appointment of Advocate dated 9<sup>th</sup> July 2025. As such **prayer (2)** of the motion has since been spent.
51. **Section 79G** of the **Civil Procedure Act** provides that:

**Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.**

**52. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR-SCK, the Court held as follows on extension of time to file an appeal out of time:**

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;**
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;**
- 3) Whether the Court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4) Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
- 5) Whether there would be any prejudices suffered by the Respondents if the extension was granted;**
- 6) Whether the application had been brought without undue delay; and;**

**7) Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.**

**53.** The time stipulation is a requirement of the law as clearly stated in **Section 79 G of the Civil Procedure Act**. In short, parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the Court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the Applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the Respondent. In this regard, the Court in **Paul Wanjohi Mathenge Vs. Duncan Gichane Mathenge [2013] eKLR** the Court of Appeal while referring to other authorities observed:

**“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors states in previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the Respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004, this Court held: - “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is**

unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in *Mwangi v Kenya Airways Ltd.* [2003] KLR 486 in which this Court stated: \_ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

For instance, in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi-Civil Application No Nai. 255 of 1997 (unreported)*, the Court expressed itself thus: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

54. The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the *Salat case (Supra)*, the court observed thus;

“Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence,

**one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay a basis where they seek Courts to grant it”.**

55. In the instant case, the substance of circumstances enumerated by the applicants that led to the delay in filing an appeal have not been denied by the Respondent who has essentially only raised various counter arguments as to the court should find that the reasons given do not merit the prayers sought. Having addressed my mind to these reasons advanced by the Applicants, I am satisfied that their failure to file their appeal in time was as a consequence of the court adjourning its ruling in the 1<sup>st</sup> instance and subsequently delivering the same without proper and adequate notice to the applicant’s Advocates on record who in turn failed to communicate the said delivery to their clients. In this regard, for reasons that it is trite that the sins of an advocate ought not be visited upon an innocent litigant, I am satisfied that the Applicants merit the exercise of the court’s discretion in their favour.

56. On whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal, from onset I must mention that 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**, is in my view wide enough to cover the present application and entertain a remedy for 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.”**

57. Further, **Article 159(2)(d)** of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. In addition, the court may draw upon the wide powers granted to it by **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.

58. In this regard, I note that although the Applicants filed a Notice of Motion instead of Summons and in my view in light of the above cited provisions of the Constitution and relevant Statute, this procedural technicality does not affect the substance of the case. The conditions which a party must establish

in order for the Court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules.

**“No order for stay of execution shall be made under sub rule (1) unless—**

**a. the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b. such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”**

59. The Court of Appeal in **Butt v Rent Restriction Tribunal** [1982] KLR 417 gave guidance on how a Court should exercise discretion. Substantial loss was very well elucidated in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** [2012] eKLR. On the issue of security, it is not in dispute that the Applicants are beneficiaries of the intestate estate of the **late James Kimaru Bundotich. In re Estate of Richard Kigundu Kigera (Deceased) (Succession Cause 192 of 2013 & 114 of 2022 (Consolidated))** [2024] KEHC 16277 (KLR), the Court held that in **cases of succession, there is no need for provision of security.** The threshold for an arguable appeal is not whether the appeal will succeed but whether it raises a bona fide issue that ought to be fully ventilated before the appellate Court; see **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others** [2013] eKLR.

**60.** Having considered the issues herein raised by the Applicant and the responses thereto by the Respondent, I am well satisfied that the Application has met the required threshold for the granting of an order of stay of execution pending appeal. In this regard, I find merit in the Applicant's Application and the same is allowed as follows;

- i. That pending the hearing and determination of the intended Appeal, an order of stay of execution of the Ruling and all consequential orders of the Hon C. Kesse, PM in Eldoret CM Succession Cause No. E063/2021 Estate of James Kimaru Bundotich delivered on 15<sup>th</sup> July 2024 be and is now hereby issued.**
  
- ii. That leave is now hereby granted to the Applicants to file their intended appeal against the Ruling and order of the Hon. C. Kesse, PM in Eldoret CM Succession Cause No. E063/2021 Estate of James Kimaru Bundotich delivered on 15<sup>th</sup> July 2024. The same is to be filed and served within 21 days from the date of this Ruling failure to which the stay orders shall be deemed to have lapsed.**
  
- iii. Costs shall be in the cause.**

Read dated and Signed at **ELDORET** on **20<sup>th</sup> February 2026**

**E. OMINDE**  
**JUDGE**