

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**SUCCESSION CAUSE NO E148 OF 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS KIPKOECH**  
**CHEPTOO ALIAS KIMOSO (DECEASED)**

**JOSEPH YATICH.....1<sup>ST</sup> EXECUTOR**  
**MICHAEL KWAMBAI.....2<sup>ND</sup>**  
**EXECUTOR**

**VERSUS**

**MARGARET JEPKEMBOI KIMOSO.....1<sup>ST</sup>**  
**PROTESTOR**  
**ABRAHAM KIPKOSGEI KIMOSO.....2<sup>ND</sup>**  
**PROTESTOR**  
**MARK CHIRCHIR TAIWA.....3<sup>RD</sup>**  
**PROTESTOR**  
**NICHOLAS KIPROP KIPKOECH.....4<sup>TH</sup>**  
**PROTESTOR**  
**RUTH JEMELI KIMOSO.....5<sup>TH</sup> PROTESTOR**  
**AMOS CHERUIYOT TAIWA.....6<sup>TH</sup>**  
**PROTESTOR**

**Coram: Justice R. Nyakundi**  
**M/s Tum & Associates Advocates**  
**M/s Mutai Oduor & Co Advocates**  
**M/s Songok & Co Advocates**

**RULING**

1. What is pending before this Court for determination is a Notice of Motion Application dated 17<sup>th</sup> December 2025 premised under Order 42 rule 6(1) (2), Order 52 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act in which the Applicants are seeking the following orders;
  - a. *Spent*

- b. That this Court be pleased to grant stay of execution of the Ruling delivered in ELDORET SUCC NO E148 of 2024 on 14<sup>th</sup> November 2025 and all the consequential orders therein pending the hearing and determination of this application.*
  - c. That this Court be pleased to grant stay of execution of the Ruling delivered in ELDORET SUCC NO E148 of 2024 on 14<sup>th</sup> November 2025 and all the consequential orders therein pending the hearing and determination of the intended Appeal.*
  - d. That this Honourable Court does and hereby grant leave to the Applicant to Appeal the said decision in the Court of Appeal.*
  - e. Such other orders be made as are just and expedient in the interest of justice.*
  - f. Costs of this application be provided for.*
2. The Application is based on the following grounds on the face of it among others: -
- a. This Honourable Court delivered a Ruling on 14<sup>th</sup> November 2025 giving structural interdict to wit that the original WILL be transmitted to the document examiner at DCI Eldoret for examination and report to be tabled before it within 45 days.
  - b. That the Applicants are aggrieved by the whole of the said Ruling.
  - c. That further the said Appeal raises serious, weighty and triable issues of both fact and law and has high chances of success hence ought to be heard on merit.
  - d. The Applicants believe that their appeal stands a good chance of success and that the Appeal may be rendered nugatory if stay of execution of the Ruling is not granted and the judgement be stayed pending appeal.
  - e. That unless the orders sought herein are granted, the Deputy Registrar may proceed and execute the said orders as are within the 7 days granted.
  - f. That it is in the interest of justice this application be allowed.

3. The Application is supported by the annexed affidavit sworn by Maurice Kimoso who deponed as follows: -
- a) *That I am the son to the estate of Francis Kipkoech Cheptoo alias Kimoso.*
  - b) *That having been read to and explained the contents of the Ruling by my advocates on record which I verily believe to be true, I have opted to prefer and appeal from the said ruling of the trial judge.*
  - c) *That this Honourable Court delivered Ruling in ELDORET SUCC. NO E148 OF 2024 on 14<sup>th</sup> November 2025 and consequently gave adverse orders against the Estate to the extent of prosecuting a party's application instead of relying on evidence before it to make a determination.*
  - d) *That being aggrieved by the said Ruling of the Honourable Court I intend to prefer an appeal with high chances of success.*
  - e) *That the effect of the said orders is that the estate will suffer substantial loss as it is expected bear the costs of the intended examination on the WILL when it is the Applicant seeking to dispute the WILL who was supposed to challenge the same with evidence.*
  - f) *That have been advised by my Advocate which advice I solely believe that the intended Appeal raises triable issues with high chances of success.*
  - g) *That the Respondents will not be prejudiced in any way if the orders sought are granted.*

### **Replying Affidavit**

4. The Application is opposed by the 2<sup>nd</sup> to 6<sup>th</sup> Protestors vide a Replying Affidavit dated 4<sup>th</sup> February 2026 sworn by Amos Cheruiyot Taiwa who deponed as follows: -
- a. *That I am the 6<sup>th</sup> Protestor/Respondent herein fully conversant with the facts of this case.*
  - b. *That I swear this affidavit on my own behalf and on behalf of the 2<sup>nd</sup> to 6<sup>th</sup> Protestors with their consent.*

- c. That the contents of the Executor/Applicants' application dated 17<sup>th</sup> December 2025 have been read out and explained to my Co-protestors and I by our advocate on record, Ms. Isiaho and having duly understood its import and purport, we wish to reply thereto as follows: -
- d. That the said application is gimmick by Maurice and Jane Kimoso to delay the determination of this matter at our expense. The Supporting Affidavit to the application and not executors of the WILL.
- e. That the application is a confirmation that the contested WILL is indeed a forgery.
- f. That the Executors and by extension Maurice and Jane Kimoso have not demonstrated prejudice they stand to suffer by the authentication of the signatures.
- g. That it is worth stating that before this Court that Maurice Kimoso and Jane Kimoso are already enforcing the contents of the WILL on our late father's estate.
- h. That to demonstrate the length the said Maurice and Jane Kimoso are willing to go achieve their greedy ends, they: -
- a) Secretly took the body of our late brother from the mortuary and buried him in a shallow grave without participation of his family.
  - b) Have threatened us with eviction to enable them take possession, use and control of the parcels allegedly bequeathed to them by the disputed will.
  - c) They are using the chief and police to harass us yet these proceedings are yet to be heard and determined.
- i. That should this Court allow the said Maurice Kimoso to exercise his constitutional right of appeal: we pray that this Honourable Court in the best interest of justice allow us to utilize the portions allocated to each of us by the family meetings pending the hearing and determination of both these proceedings and the intended appeal.
- j. That most of us risk being rendered destitute by the illegal actions of the said Maurice and Jane Kimoso.

- k. *That we are living in fear of being evicted and our residential premises being demolished as threatened by Maurice and Jane Kimoso hence rendering appropriate orders of this Court necessary in the best interest of justice.*
- l. *That in the foregoing, the application before court ought to be dismissed forthwith and/or orders issued in terms of paragraph 9 above.*
- m. *That the executors will not suffer any prejudice as they are not beneficiaries to the estate of our late father.*
5. The Application was canvassed by way of Written Submissions.

### **1<sup>st</sup> Protestor's Written Submissions**

6. The 1<sup>st</sup> Protestor filed her Written Submissions dated 9<sup>th</sup> February 2026 through her learned counsel Mr. Songok who submitted on the issue of stay of execution as provided in Order 42 rule 6 of the Civil Procedure Rules 2010. Counsel made reference to the case of ***Tabro Transporters Ltd Vs Absalom Dova Lumbasi (2012) eKLR*** and stated that the conditions of grant of stay are inter alia: the court is satisfied substantial loss may occur to the applicant unless the order is given; there was unreasonable delay in making the Application for stay and the court may order for security to be furnished for due performance of any such pertinent decree or order. Counsel made reference to the case of ***Northwood Services Ltd Vs MAC & MORE Solution Ltd (2015) eKLR*** and ***Charles Ngatia Nguyo Vs Erika Gathoni Kariithi & Another (2014) eKLR***.
7. On substantial loss, counsel submitted that the Appellant/Applicant has adequately demonstrated that she stands to face substantial loss should the orders sought therein not be granted to her and cited the case of ***James Wangalwa & Another Vs Agnes Naliaka Chesoto [2013] eKLR***. He also submitted that the Executors in this case have not documented how they stand to lose substantially if the instant is WILL is subjected to examination.

8. On the issue of unreasonable delay, counsel submitted that failure to adequately demonstrate that the application for stay was made at the earliest moment possible, this ought to lead the court to the conclusion that there was an unreasonable delay in making the application and made reference to the case of ***M'Ndaka Mbiuki Vs James Mbaaba Mungwira [2010] eKLR***. Counsel submitted on this issue that in the instant case before this Honourable Court, the Executors have not acted timeously, the judgement in point having been issued entered and that they only instructed their firm of Advocates law firm on record to file the instant Application.
9. On the issue of security for due performance of the decree, counsel made reference to the case of ***RWW Vs EKW (2019) eKLR*** and ***Gianfranco Manenthi & Another Vs Africa Merchant Assurance Company Ltd [2019] eKLR*** and submitted that in this regard, the security for due performance of the decree under Order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgement in case the appeal fails.
10. On the issue of the Appeal being rendered nugatory, counsel made reference to the case of ***Stanley Kang'ethe Kinjanjui Vs Tonny Ketter & 5 Others (2013) eKLR***. He added that any future appeal will not be rendered nugatory if the Executors succeed on appeal and in any case, they have not demonstrated any arguable, let alone successful appeal by failing to file any draft Memorandum of Appeal in their Application. It was his final submission that the instant Application is not merited and as such ought to be dismissed accordingly.

### **Analysis and Determination**

11. Before, I delve into the substantive merits of this application, I take note that this Court in its ruling dated 14<sup>th</sup> November 2025 gave the following orders: -

**38.** *From the above, I find it appropriate to forward the last original Will to the Forensic Document Examiner to address the real question surrounding the objection to the making of the last Testamentary of the deceased. For purposes of this undertaking, it is apposite for the following orders to flow:*

- a. That the original Will in custody of the Deputy Registrar of this Court shall be transmitted to the Document Examiner at the Directorate of Criminal Investigations through the County Criminal Investigation Officer, Uasin Gishu within 7 days of this ruling.*
- b. That the Administrators of the estate and the Protesters shall, within 7 days of this ruling, avail to the County Criminal Investigation Officer at least samples of the three original documents bearing the known signatures of the deceased.*
- c. That the Document Examiner thereafter shall file a comprehensive report with this Court within 45 days from the date of receiving both the Will and the specimen signatures.*
- d. That a declaration is made under Section 58 (b) & (c) of the Civil Procedure Act under Article 159 (2) (c) of the Constitution that the issue of interment of their sibling who has been in mortuary for quite some time now be unfrozen from these proceedings.*
- e. That from now henceforth in the interim period this case docket shall be monitored for compliance by the Deputy Registrar of the High Court until the 19<sup>th</sup> January 2026.*
- f. That the costs of the examination shall be borne by the estate.*
- g. That a status conference shall be held on 19<sup>th</sup> January 2026 for further directions based on the Examiner's Report.*

**39.** *Orders accordingly.*

12. I have read and considered the Notice of Motion Application, the Replying Affidavit in opposition of the same and the rival submissions. There are two (2) issues manifest for determination by this Honourable Court: -

- a. Whether this Court should grant stay pending Appeal?*

*b. Whether this Court should grant leave to appeal?*

**Whether this Court should grant stay pending Appeal?**

13. The Applicant also seeks a stay of execution pending appeal. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides: -

***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.*

14. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely;

a) That substantial loss may result to the applicant unless the order is made,

b) That the application has been made without unreasonable delay, and

c) That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See ***Antoine Ndiaye Vs African Virtual University [2015] eKLR.***

15. The jurisprudence interpreting these provisions establishes that for the court to order a stay of execution, four essential elements must be demonstrated: first, sufficient cause for the grant of stay; second, proof that substantial loss will result to the applicant if stay is not granted; third, absence of unreasonable delay in making the application; and fourth, provision of adequate security. The court's consideration of these factors was articulated in ***Stephen Wanjiku v Central Glass Industries Ltd [Nairobi HCC No. 6726 of 1991]***, which established this four-fold

test as the framework for evaluating stay applications. The court held that: -

*“For the court to order a stay of execution there must be;*

- a. Sufficient cause;*
- b. Substantial loss;*
- c. No unreasonable delay;*
- d. Security and the grant of stay is discretionary.”*

16. In **James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR**, The Court observed that: -

*No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.*

17. The Court, in **RWW Vs EKW [2019] eKLR**, 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.*

18. 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. I am equally guided by the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417** where the court held that: -

1. *“The power of the court to grant or refuse an application of stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
2. *The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge’s discretion.*
3. *The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements*

19. The cornerstone of an application for stay is proof of substantial loss. The Applicants argue that the estate will suffer loss by being required to meet the costs of forensic examination of the Will. With respect, that argument is untenable. The impugned orders do not distribute the estate. They do not alienate property. They do not confer proprietary rights. They merely direct authentication of a contested testamentary instrument a step necessary for just determination of the cause. Moreover, the cost of examination, ordered to be borne by the estate, is an incidental expense in administration. It does not amount to substantial loss within the meaning of Order 42 Rule 6 of the Civil Procedure Rules. Succession proceedings inherently involve administrative costs and authentication of a disputed Will is directly tied to the Court’s duty under Section 47 of the Law of Succession Act to determine all matters relating to estates of deceased persons. Substantial loss must be real, demonstrable and irreparable. The Applicants have not shown that payment of examination costs would occasion irreparable prejudice. If ultimately the Will is upheld or rejected, the Court retains jurisdiction to make appropriate orders on

costs. More importantly, the ruling of 14<sup>th</sup> November 2025 was interlocutory in nature. It was directed at uncovering the truth regarding the authenticity of the Will. To stay such an order would be to suspend the fact-finding process itself. That would defeat, rather than promote, the ends of justice. I therefore find that substantial loss has not been demonstrated.

20. On the issue of delay, the ruling was delivered on 14<sup>th</sup> November 2025. The present application was filed on 17<sup>th</sup> December 2025. While not grossly delayed, the surrounding circumstances are telling. No Notice of Appeal has been exhibited. No draft Memorandum of Appeal has been annexed. No specific grounds of appeal have been set out to enable this Court assess arguability. The assertion that the intended appeal has “high chances of success” is bare and unsupported. Courts do not act on conjecture. In the absence of any formal step toward appeal, the application appears calculated to interrupt compliance with the very orders designed to determine the authenticity of the Will. The matter was actively ongoing, with timelines already set and a status conference scheduled. The Court cannot ignore the practical reality that staying authentication would effectively stall the succession proceedings indefinitely. That lends credence to the Respondents’ contention that the application is intended to delay.
21. On the issue of security for costs, it must be appreciated that succession proceedings are fundamentally distinct from ordinary civil litigation. Unlike civil disputes where a decretal sum is payable to a successful litigant, probate matters concern the identification, preservation and distribution of a deceased’s estate for the benefit of rightful beneficiaries. Consequently, the requirement for security under Order 42 Rule 6 of the Civil Procedure Rules is not to be applied mechanically in succession causes. In most instances, there is no executable money decree but rather administrative or preservatory orders. To insist on security in such circumstances may unduly burden the estate or beneficiaries and defeat the equitable and facilitative character of probate jurisdiction. The Court

must therefore exercise caution and consider the nature of the orders appealed from, the stage of the proceedings, and whether any real prejudice would arise in the absence of security, bearing in mind that the overarching objective in succession matters is preservation and orderly distribution of the estate rather.

### **Whether Leave to Appeal Should Be Granted?**

22. As per the provisions of the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal. This was buttressed by the Court of Appeal in the case of **Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another [2014 eKLR]** which made the following observations with regards to appeals in succession matters against the decisions of the High Court exercising its original jurisdiction: -

*“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 merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”*

23. As held in *Rhoda Wairimu Karanja (supra)*, this court can be prompted to grant the leave sought by the applicant herein where circumstances require, such as when weighty issues arise requiring further serious judicial consideration and interrogations. If this court declines to grant the leave sought by the applicant, then she will be at liberty to seek the same in the appellate court. In **John Mwita Murimi & 2 Others Vs Mwikabe Chacha Mwita & Another [2019] eKLR**, the Court of Appeal reaffirmed this position by holding as follows: -

*“...Under the Law of Succession Act, there is no express automatic right of Appeal 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...”*

24. Furthermore, 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.*

25. This provision donates 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. From the facts of this case, the Applicants seek leave to appeal. It is noteworthy that the impugned ruling concerns procedural and evidentiary directions within an ongoing succession cause. No draft Memorandum of Appeal has been filed. No Notice of Appeal has been lodged. No specific point of law has been identified. Leave to appeal is not granted as a matter of course. An applicant must demonstrate arguable and substantive points of law to be dealt with at the Court of Appeal. At this point, this Court has not been furnished with any such grounds.

26. The direction to subject a contested Will to forensic examination cannot, in itself, be said to raise a novel or grave point of law. On the contrary, it is consistent with the Court’s duty to ascertain the authenticity of testamentary instruments before pronouncing upon their validity. I therefore find no sufficient basis laid for grant of leave.

27. Given the acrimony disclosed in the affidavits including allegations of eviction threats and interference with occupation, it is necessary to safeguard the estate and maintain status quo pending receipt of the forensic report. Under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, this Court retains inherent jurisdiction to make such orders as may be necessary for the ends of justice and to prevent abuse of process.

28. In the result, I find that the Notice of Motion dated 17<sup>th</sup> December 2025 lacks merit. Accordingly, I make the following orders: -

- a) *That the Application dated 17<sup>th</sup> December 2025 seeking stay of execution pending appeal and leave to appeal is hereby dismissed.*
- b) *That the orders issued on 14<sup>th</sup> November 2025 shall remain in force and be complied with forthwith.*
- c) *That for avoidance of doubt, the Deputy Registrar shall ensure immediate transmission of the original Will to the Forensic Document Examiner in compliance with the ruling of 14<sup>th</sup> November 2025.*
- d) *That pending receipt and consideration of the Forensic Document Examiner's Report, status quo ante shall be maintained with regards to this estate.*
- e) *That any party who will be in violation of the aforementioned orders shall be cited for contempt.*
- f) *This matter shall proceed strictly in accordance with the timelines set in the ruling of 14<sup>th</sup> November 2025.*
- g) *That there shall be no orders as to the costs of this application.*

29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 13<sup>TH</sup> DAY  
OF FEBRUARY 2026**

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**R. NYAKUNDI**  
**JUDGE**