



**In re Estate of the Late Joseph Toroitich Cheron (Deceased) (Succession Cause 46 of 2020) [2026] KEHC 1130 (KLR) (9 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 46 OF 2020  
RN NYAKUNDI, J  
FEBRUARY 9, 2026**

**IN THE MATTER OF THE ESTATE OF THE LATE  
JOSEPH TOROITICH CHERONO (DECEASED)**

**BETWEEN**

**PATRICK CHERONO TOROITICH ..... 1<sup>ST</sup> APPELLANT  
KENNETH KIPTOO CHERONO ..... 2<sup>ND</sup> APPELLANT  
RAYMOND CHERONO ..... 3<sup>RD</sup> APPELLANT  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ROSEBELLA  
CHERONO**

**AND**

**RUTH CHERONO ..... RESPONDENT**

*(An application for seeking leave to file and serve a record of appeal from the judgement and decree of the Succession Cause No 46 of 2020 at Eldoret High Court by Nyakundi J delivered on 17th September 2025)*

**RULING**

1. What is pending before this Honourable Court is Notice of Motion Application dated 2<sup>nd</sup> December 2025 premised under Articles 48, 159 (2)(a) & 164 (3)(A) of [the Constitution](#) of Kenya 2010, section 47 of the [Law of Succession Act](#), Rules 49, 59 & 73 of the Probate and Administration Rules in which the Applicants are seeking the following orders: -
  - a. Spent
  - b. That this Honourable Court be pleased to grant leave to the Applicants/Petitioners herein to file an appeal arising from the judgment of Honourable Justice R. Nyakundi J delivered on the



17<sup>th</sup> day of September 2025 in Eldoret High Court Succession Cause No. 46 of 2020, In the Matter of the Estate of Joseph Toroitich Cheron (Deceased).

- c. Costs of this application abide in the appeal.
2. The Application is made on the following grounds on the face of it: -
- a. That the Applicants/Petitioners are greatly aggrieved by the Judgement delivered by this Honourable Court on 17<sup>th</sup> September 2025 and they desire to seek another opinion from the Superior Court.
  - b. The intended Appellants/Petitioners are well informed that there is no automatic right of appeal in probate and administration matters hence the need for leave be issued before any appeal is preferred.
  - c. The leave to appeal in probate and administration matters is mandatory in law.
  - d. The Appellants/Petitioners have an arguable appeal to be preferred and it is only fair and just if the intended Appellants/Petitioners be granted leave to file this appeal against this court's judgement delivered on 17<sup>th</sup> September 2025.
  - e. The Appellants/Petitioners undertake to expeditiously prosecute the intended appeal in a timely manner so as not to prejudice the beneficiaries of the estate of Joseph Toroitich Cheron (Deceased).
  - f. The Appellants/Petitioners and his family have been living on the suit parcel since 1964 and they have known the suit parcel to be their only home place of aboard.
  - g. The Appellants /Petitioners have an arguable appeal.
  - h. The grant of the orders sought would maintain the status on the suit parcels and is thus not inconveniencing any beneficiary of the Estate of Joseph Toroitich Cheron (Deceased).
  - i. This application has been timeously made.
  - j. No prejudice will be occasioned on any of the Respondents by the grant of the orders sought. The Respondents will have their day in the Appellate Court if leave is granted.
3. The Application is supported by the annexed Affidavit sworn by Patrick Toroitich Cheron, the 1<sup>st</sup> Applicant who deponed as follows: -
- a. That on the 17<sup>th</sup> day of September 2025, this Honourable Court delivered judgement and decree in Probate and Administration Cause No 46 of 2020, distributing the estate of the deceased among the 17 beneficiaries.
  - b. That I am dissatisfied with the said judgment/decree in that without limiting to the following, the court committed material errors of law and/or fact, misapplied statutory provisions and/or made orders that are unreasonable, impractical or unfair and which will gravely prejudice my rights and interests as a beneficiary.
  - c. That the principal grounds on which I seek leave to appeal are as follows:
    - a. The court's re-allocation of 13.55 hectares from one land parcel (Uasin Gishu/Illula/1) to another (Uasin Gishu/Kaptagat/214) for purposes of equalizing residential land between the two houses which I contend exceeds the court's discretionary powers under the statutory scheme and is not supported by the law or evidence.



- b. The order for valuation, liquidation or distribution of movable assets, bank accounts, shares, farm equipment and other chattels, without demonstrable independent valuation or adequate record of ownership/value, risking inequality, dissipation or misdistribution.
  - c. The practical impossibility and unworkability of the distribution scheme given the multiplicity and heterogeneity of assets, large number of beneficiaries (including several from two houses, or children of a deceased son) and likely disputes hence the decree is likely to lead to further litigation rather than finality.
  - d. The failure of the court to sufficiently consider equitable factors such as contribution to asset acquisition, domicile, usage, occupation and family circumstances in a polygamous estate thereby undermining fair and substantive justice.
  - e. The risk of prejudice, dissipation and miss-management of estate assets pending execution/distribution under the judgement if orders remain valid.
- d. That I verily believe there are prima facie grounds calling for serious judicial consideration by the Court of Appeal that my appeal stands a reasonable chance of success, or at least raises serious questions deserving appellate review.
  - e. That it is in the interest of justice that leave be granted in order to allow appellate scrutiny, preserve estate value and avoid possible miscarriage of rights especially given the complex nature of the estate and the finality such distribution would effect.

### **Replying Affidavit**

4. The Application is opposed vide a Replying Affidavit dated 15<sup>th</sup> January 2026 sworn by Ruth Cheronu, the Respondent who deponed as follows: -
  - a. That I am the surviving widow and a beneficiary of the estate of Joseph Toroitich Cheronu (Deceased).
  - b. That I have read the Applicant's application dated 1.12.2025 and had the same explained to me by my advocates on record, M/s Omwenga & Co Advocates and having understood the same, I wish to respond as follows;
  - c. That the application dated 2.12.2025 is not properly on record as the petitioners have not filed a Notice to act in person as the firm of M/s Kutto & Kaira Nabasenge is still on record for the Petitioners/Applicants and therefore the same should be struck out.
  - d. That the Petitioners/Applicants allegation that appeal against the judgement delivered by this Honourable Court on 17.9.2025 to the Court of Appeal is not as of right and that they have to be granted leave by this Honourable Court is misguided and has no legal basis.
  - e. That the Petitioners/Applicants have already filed an Appeal against the very judgement delivered on 17.9.2025 in the Court of Appeal vide Eldoret COA Civil Appeal No E083 of 2025 which is pending determination by the Honourable Court.
  - f. That the Petitioners/Applicants have also filed and served a record of appeal dated 24.10.2025 in respect of Eldoret COA Civil Appeal No. E083 of 2025 which was served upon our Advocates, the firm of M/s Omwenga & Co Advocates on 4.11.2025.



- g. That the Petitioners/Applicants are acting in person in the Court of Appeal matter filed vide Eldoret COA Civil Appeal No. E083 of 2025.
- h. That the Petitioners/Applicants cannot purport to seek the leave of the Court to file an appeal which they have already filed and is pending determination. If at all they were to seek leave of the Court, then they ought to have done so prior to filing of the appeal.
- i. That in fact, the Petitioners/Applicants have filed an Application in the Court of Appeal matter, Eldoret COA Civil Appeal No. E083 of 2025, an application seeking stay of execution of the judgement delivered on 17.9.2025 pending the hearing and determination of the said appeal.
- j. That on 13.11.2025, the Court of Appeal gave its directions on the Petitioners/Applicants application for stay of execution pending the appeal dated 13.11.2025 and therefore the same is only pending determination by the Court.
- k. That the application herein is therefore a waste of court's time, an abuse of the judicial process and the same should not be entertained.
- l. That the application herein is also meant to frustrate the process of transferring the properties of the estate to the respective beneficiaries as per the judgement delivered by this Honourable Court.

**Further Affidavit dated 26<sup>th</sup> January 2026**

- 5. The Appellant also filed a Further affidavit dated 26<sup>th</sup> January 2026 in which he deponed as follows: -
  - 1. That the facts deponed to herein are within my own personal knowledge save where otherwise stated to be on information and belief, and where so stated, the sources of such information are true, reliable and duly disclosed.
  - 2. That this is a Further Affidavit filed in support of and in supplementation of my previous affidavits sworn in this cause, and I hereby adopt and rely on the contents of all such affidavits as if the same were fully set out herein.
    - A. Discrepancies Concerning the Second Marriage to Ruth Jerono Cherono
  - 3. That Ruth Jerono Cherono (also known as Ruth Cherono) was born in the year 1954, as evidenced by her National Identity Card Number 4897838 issued in the names of Ruth Jerono Cherono.
  - 4. That her education records indicate that she attended Plateau Primary School, Holy Rosary School, Kessup Girls High School, and later completed her secondary education at Wareng High School in the year 1975.
  - 5. That in her Chamber Summons dated 14th March 2024 and filed through the firm of Omwenga & Co. Advocates, she claimed that she was married to the deceased in the year 1967, which is an impossibility as she would have been only thirteen (13) years old at the time based on her stated year of birth.
  - 6. That she annexed a Marriage Certificate Number 3188 dated 14th November 1975, indicating her age as twenty-six (26) years, thereby creating a five (5) year discrepancy with her year of birth and further conflicting with the fact that she completed Form Four in 1975, which suggests that she appears to have been married to a bachelor with a four (4) year age difference.



7. That the valid and lawful marriage between the deceased, who was aged sixty-three (63) years, and Ruth Cherono, who was aged fifty-three (53) years, was registered under Marriage Certificate Number 3853 on 12th June 2004, thereby reflecting a ten (10) year age difference.

B. First Marriage and Prior Settlements to Children of the First House

8. That the marriage between the deceased and Rosebella Cherono (now deceased), being the first house, was duly registered on 30th December 1967.
9. That the deceased and Rosebella Cherono sired seven (7) children, as confirmed by the handwritten eulogy read during Rosebella Cherono's burial on 19th November 1988.
10. That in the said eulogy, the deceased stated that the two of them worked together in domestic duties and in various other forms of work at home.
11. That prior to contracting the marriage with Ruth Cherono in the year 2004, the deceased had already settled his children from the first house as follows:
  - a. That Eric Kimtai was settled at Illula Plot Number I in the year 1980, where he held owners' occupation documents from Kenya Railways (KR), constructed his own house, and was buried there in 2004. Upon his death, he left behind a widow, children, and wheat proceeds valued at approximately Kenya Shillings Eight Hundred Thousand (Kshs 800,000/-), which the deceased father took possession of. The deceased later partially compensated this by transferring a Kapsoni plot valued at Kenya Shillings Sixty Thousand (Kshs 60,000/-), and the remaining balance has deliberately been ignored by Ruth Cherono despite her knowledge of the same.
  - b. That Kenneth Kiptoo was settled at Plot Number I, Illula, from the 1980s, where he constructed his house prior to being formally awarded the land by the deceased on 28th April 1995.
  - c. That Raymond Cherono was settled at Kaptagat Plot Number 214 in the year 1990.
  - d. That I, Patrick Toroitich Cherono, was settled at Kaptagat Plot Number 228 in the year 1996.

8. That the second house ought to be restrained from interfering with, encroaching upon, or meddling in the aforesaid settlements made in favour of the children of the first house.

C. Allegations of Intermeddling with Estate Assets

13. That in the year 2021, Ruth Cherono unlawfully withdrew funds belonging to the deceased from Eldoret Club, being Membership Number 888 and has since 2019 been collecting monthly rental income from Kingongo Rooms and MM Stores Block 7/26 without the consent of the family, amounting to approximately Kenya Shillings Four Million (Kshs 4,000,000/-).
14. That in the year 2021, she took over the deceased's shareholding rights in Elgeyo Border Limited valued at approximately Kenya Shillings Eight Hundred Thousand (Kshs 800,000/-).
15. That she appropriated farm proceeds exceeding Kenya Shillings Three Million (Kshs 3,000,000/-) under the claim that the same was used to settle hospital bills, yet Joseph Toroitich Cherono personally settled all MP Shah Hospital bills on 17<sup>th</sup> December 2019 using proceeds from the sale of his own land.



16. That Ruth Cherono jointly with Christopher Kipkemboi Cherono sold family machinery including Tractor Registration Number KLR 148, a boom-spray, harrow and trailer, all valued at approximately Kenya Shillings Five Million (Kshs 5,000,000/-), without any lawful authority.

D. Request for DNA Verification and Conditional Provisions

17. That in order to clarify the paternity claims of the five (5) children claimed by Ruth Cherono and to assist in equitable distribution of the estate, this Honourable Court is prayed to consider ordering non-invasive DNA testing through half-sibling comparisons among the known biological children of the deceased.
18. That should DNA testing confirm that the said children are biological children of the deceased, reasonable provision be made for their maintenance and inheritance from the estate pursuant to Sections 26 to 29 of the *Law of Succession Act* (Cap 160) relating to dependants.
19. That any property inherited by Ruth Jerono Cherono from her father, being approximately sixty-five (65) acres known as LR Soy/Soy Block 8 (Sergoit), does not form part of the estate of Joseph Toroitich Cherono, was never his free property, and ought to be excluded from this succession cause and devolve solely to her children in accordance with her wishes or applicable law.
20. That if DNA results reveal that the said children are not biological children of the deceased, this Honourable Court is prayed to issue appropriate directions limiting or excluding their claims to this estate.

Supporting Documents Annexed

21. That the following documents are annexed hereto in support of this affidavit and marked accordingly:
22. That annexed and marked are:
  - a. PTC-1: Eulogy of Rosebella Cherono dated 19th November 1988
  - b. PTC-2: Deceased's diary excerpts covering the period 1962–1968
  - c. PTC-3: Marriage Certificates (Rosebella – 1967; Ruth – 2004)
  - d. PTC-4: MP Shah Hospital medical information
  - e. PTC-5: Medical bill payment details dated 17th December 2019
  - f. PTC-6: Land searches for Kingongo Block 21 and Illula Block I
  - g. PTC-7: Land sale agreements
  - h. PTC-8: Animal farm records from 1964
  - i. PTC-9: Farm machinery records from 1981
  - j. PTC-10: Farm gift to Kenneth Kiptoo dated 28<sup>th</sup> April 1995
  - k. PTC-11: Chamber Summons dated 14<sup>th</sup> March 2024
23. That the foregoing facts demonstrate material inconsistencies, prior settlements and prima facie acts of intermeddling contrary to Section 45 of the *Law of Succession Act*, which prohibits



unauthorized dealing with the property of a deceased person and attracts penal consequences including fine, imprisonment, or both.

24. That the intervention of this Honourable Court is necessary to safeguard the estate and ensure fair, lawful and equitable distribution in accordance with the *Law of Succession Act* and Article 27 of *the Constitution* of Kenya.

I humbly pray that this Honourable Court be pleased to:

- a. That note the discrepancies surrounding the alleged marriages and confirm the validity of the second marriage dated 12th June 2004;
- b. That restrain the second house from interfering with the settlements made in favour of the first house;
- c. That inquire into acts of intermeddling relating to club funds, shares, proceeds and machinery and order restitution and/or accounting;
- d. That if deemed fit, order non-invasive sibling DNA testing to verify paternity;
- e. That upon confirmation of paternity, make reasonable provision for maintenance and inheritance of the said children from the estate;
- f. That declare the approximately sixty-five (65) acres known as LR Soy/Soy Block 8 (Sergoit) inherited by Ruth Jerono Cheronno excluded from this estate and devolving solely to her children in accordance with her wishes;
- g. That if DNA does not confirm paternity, issue directions excluding or limiting claims and grant consequential relief; and
- h. Grant such further or other orders as this Honourable Court may deem just and expedient.

### **Applicants Written Submissions Summary**

6. I take note the Applicants filed written submissions dated 30<sup>th</sup> December 2025 through their representative, the 1<sup>st</sup> Appellant/Applicant herein Mr. Patrick Cheronno. I take note that Mr. Patrick Cheronno submitted on two (2) issues being:
  - a. Whether this Court has jurisdiction to grant leave to appeal in a succession matter emanating from the High Court sitting in its appellate jurisdiction?
  - b. Whether the intended appeal raises arguable matters of law deserving consideration by the Court of Appeal?
7. In the first issue, Mr. Patrick Cheronno submitted that section 50 (1) of the *Law of Succession Act* provides that appeals from the High Court in its appellate jurisdiction lie to the Court of Appeal on matters of law and only with leave. Reference was made to the case of Rhoda Wairimu Karanja & Another Vs Mary Karanja [2014] eKLR; Peter Gichuki King'ara Vs IEBC & 2 Others [2014] eKLR. He also made reference to Article 164 of *the Constitution*; section 3A of the *Appellate Jurisdiction Act* and Rules 39, 41 & 77 of the Court of Appeal Rules 2022.
8. On the second issue, he submitted that the draft memorandum of Appeal raises weighty, bona fide and substantial points of law while citing the case of Stanley Kang'ethe Kinyanjui Vs Tony Ketter [2013] eKLR. he summarized the points from the second issue to include: -



- a. Error in the application of section 40 of the *Law of succession Act* while citing the case laws of Stephen Gitonga M'murithi Vs Faith Murithi [2015] eKLR; Rono Vs Rono [2005] eKLR
  - b. Failure to consider the matrimonial property rights and contribution while citing the case of MNK Vs POM [2021] eKLR.
  - c. Reliance on invalid or improperly proved documents while citing the case of Kenneth Nyaga Mwige Vs Austin Kiguta [2015] eKLR;
  - d. Dismissal of application for paternity verification while relying in the case of In re Estate of JNK [2016] eKLR; In re Estate of CK [2019] eKLR.
  - e. Denial of the right to be heard and failure to involve all beneficiaries and submitted that the estate of the deceased's first wife was not represented in the proceedings, contrary to Article 50(1) and made reference to the case of Judicial Service Commission Vs Mbalu Mutava [2015] eKLR; Kiarie Vs R [1984] eKLR.
9. He finally urged this Honourable Court to grant leave to appeal against the Judgement of the High Court delivered on 17<sup>th</sup> September 2025 and deems the Notice of Appeal dated 25<sup>th</sup> September 2025 as duly and properly filed and award the costs to abide the outcome of the intended appeal.

### **Analysis and Determination**

10. Having carefully considered the Application, the affidavits on record and the rival arguments, there are three (3) issues manifest for determination by this Honourable Court: -
- a. Whether leave to appeal is merited in the circumstances of this case?
  - b. Whether the present Application amounts to an abuse of the court process?
  - c. Whether the Further Affidavit dated 26<sup>th</sup> January 2026 and Written Submissions dated 30<sup>th</sup> December 2025 are properly before this Court?

### **Whether leave to appeal is merited in the circumstances of this case?**

11. The jurisdiction of this Honourable Court to entertain this application is provided for in section 47 of the *Law of Succession Act* as read with Rule 73 of the Probate and Administration Rules. Section 47 of the *Law of Succession Act* provides as follows: -

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

12. To begin with, the judgment now under challenge was delivered on 17<sup>th</sup> September 2025. The applicable statutory framework is the *Appellate Jurisdiction Act*. In my considered view, the right of appeal in succession proceedings cannot be placed on the same footing as that in ordinary civil or commercial disputes. Succession causes are, by their very character, anchored in principles of inclusivity and family participation, spanning the entire process from the filing of a petition for a grant of representation to the issuance of the final decree in the form of a Certificate of Confirmation of Grant. For this reason, applications for leave to appeal in succession matters must be approached with circumspection. There exists a threshold that must be satisfied before such leave can be granted.



Of particular importance is the requirement that an intended appellant in a succession cause must, in the memorandum of appeal, raise weighty and substantial questions of law of general significance that warrant determination by the Court of Appeal. Inheritance rights are inherently sensitive and distinctive, and it is not uncommon for beneficiaries who fall within the definition provided under section 29 of the *Law of Succession Act* to seek to reopen matters that have already been conclusively determined not on account of any error of law apparent on the face of the impugned judgment, but purely to advance personal interests under the guise of exercising the constitutional right of appeal.

13. A further defining feature of succession litigation lies in the detailed statutory framework set out under sections 35, 36, 37, 38, 40, 41 and 42 of the *Law of Succession Act*, which prescribe the criteria for distribution depending on whether the estate is monogamous or polygamous in nature. In applying these provisions situated within the broader context of social, economic and cultural rights aimed at safeguarding the dignity of the family unit as recognized under Article 45 of *the Constitution*, it is imperative that no beneficiary be permitted to curtail or undermine the property rights of another beneficiary who is equally entitled to a share of the estate merely because the impugned judgment does not fully align with their individual expectations. It is the responsibility of the Kenyan legal system, at all levels, to ensure that succession disputes attain finality and that the enjoyment of inheritance rights is not subjected to endless re-litigation by segments of the same family in the absence of genuine and substantial questions of law. The burden squarely rests on the intended appellant to demonstrate that such question or questions of law arose before the High Court, were considered and determined, yet remain unsettled or uncertain in a manner that necessitates further interrogation by the appellate court to clarify or develop the law. A mere perception of potential prejudice or miscarriage of justice, without more, cannot suffice as a proper basis for the grant of leave to appeal in succession matters. These considerations equally inform the Court's exercise of discretion when determining whether to certify an appeal in circumstances where the estate is on the brink of being found to have contravened section 76 of the *Law of Succession Act*, thereby rendering the Certificate of Confirmation of Grant liable to revocation on account of having become inoperative. Against that backdrop, the Court now turns to its specific findings in the matter.

14. The question whether leave is a prerequisite before an appeal can be lodged from the High Court, when exercising its original jurisdiction in succession matters, remains unsettled. Divergent views persist among respected jurists, scholars and practitioners. One line of reasoning maintains that leave is indeed required in succession causes, with proponents advancing a twofold justification for that position. The first one was well captured in the case of Rhoda Wairimu Karanja & another Vs 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.”

15. 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.’

16. 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].
17. 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.’

18. Be that as it may, the Court of Appeal in the case of John Mwita Murimi & 2 others v Mwikabe Chacha Mwita & another [2019] eKLR held: -

“9 .....We re-affirm the decisions of this Court in Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR and Josephine Wambui Wanyoike Vs Margaret Wanjari Kamau & another [2013] eKLR, where it was clearly stated that in succession matters, there is no automatic right of appeal without leave of court.

10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu – v- Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another – v- Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held 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. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981).

In the instant matter, we are satisfied that no leave of the court was obtained to file the instant appeal. The present application to strike out the record of appeal has merit. We allow the Notice of Motion dated 9th August 2018 with the result that the record of appeal filed in Civil Appeal No. 93 of 2018 be and is hereby struck out with costs to the applicant.”

19. Even as the debate rages on, I should think that the focus should be on the considerations a court should take into account in granting or refusing 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]

20. According to the above precedent, 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.”

21. Further Article 164(3) (a) of *the constitution* provides that: -

- “(3) The Court of Appeal has jurisdiction to hear appeals from(a) the High Court.” These provisions thus 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.

### **Application of the test above**

22. In the present case, the Applicants have set out at length the grounds upon which they are dissatisfied with the judgment of this Court. They contend, inter alia, that the Court exceeded its discretion in reallocating portions of land between parcels for purposes of equalization, that the distribution of movable assets was impractical and that the overall scheme of distribution is unworkable and likely to occasion further disputes. Ordinarily, such complaints might raise arguable points of law or fact. However, the Court cannot consider the question of arguability in isolation from the factual and procedural posture of the matter before it.



23. The Respondent has placed before this Court uncontroverted evidence that the Applicants have already lodged an appeal against the very judgment they now seek leave to appeal from. Specifically, the Applicants filed Eldoret Court of Appeal Civil Appeal No. E083 of 2025, lodged a record of appeal dated 24<sup>th</sup> October 2025 and have since moved the Court of Appeal for stay of execution pending appeal. Directions have already been given by the Court of Appeal in respect of that application.
24. These facts have not been denied or explained away by the Applicants. Indeed, they fundamentally alter the character of the present Application. Leave to appeal is a jurisdictional gateway; it is intended to precede, not follow, the filing of an appeal. A party cannot approbate and reprobate by first invoking the appellate jurisdiction of the Court of Appeal and thereafter returning to the High Court to regularize that appeal through a belated application for leave. In my view, once an appeal has been filed and is pending before the Court of Appeal, this Court becomes functus officio on matters touching on the propriety or competence of that appeal.
25. The doctrine of functus officio dictates that once a court has rendered its final decision, it ceases to have jurisdiction over the matter, save for specific exceptions such as review or correction of clerical or arithmetical errors. The Supreme Court, in *Raila Odinga & 2 Others Vs IEBC & 3 Others* (2013) eKLR, while discussing the doctrine of functus officio, stated:-

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.”

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. ... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

26. In *Telkom Kenya Limited Vs Ochanda* (Suing on his own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR, the Court of Appeal held that: -

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *Re-St Nazaire Co*, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.”

27. From the above, the Court of Appeal reaffirmed the doctrine of functus officio, holding that once a court has fully and finally adjudicated upon a matter, it cannot reopen or reconsider the case, except under defined circumstances such as through a successful application for review. The functus officio principle serves to ensure finality in judicial decisions and prohibits courts from revisiting matters already conclusively determined, except where expressly permitted by law. It promotes judicial efficiency, certainty and the integrity of the judicial process.



28. In view of the facts presented before this Court, any question as to whether the appeal is competent, properly before the appellate court or requires leave is a matter for determination by the Court of Appeal itself. In those circumstances, this Court finds that the prayer for leave to appeal has been overtaken by events. It is no longer available to the Applicants as a matter of discretion and to grant it would serve no legal or practical purpose. Accordingly, the Court finds that leave to appeal is not merited.

### **Whether the present Application amounts to an abuse of the court process?**

29. Before, I delve into this issue, I would like to revisit the Litigation background of this intestate Succession Cause just to depict what this court has been invited to decide on. This Court has to date delivered four substantive rulings and one judgement in the matter concerning the Estate of Joseph Toroitich Cherono (Deceased), each resolving discrete yet interrelated disputes that have, regrettably, extended these succession proceedings far beyond what is reasonable. In the ruling delivered on 9<sup>th</sup> August 2024, the Court conclusively held that the *Matrimonial Property Act* was inapplicable to the estate and that distribution was instead governed by section 40 of the *Law of Succession Act*. The Court found that the estate comprised two polygamous houses with seventeen identified beneficiaries and that the statutory scheme mandates equal distribution among the houses and beneficiaries, notwithstanding the apparent disparities in spousal contribution to the acquisition of the estate assets.
30. Thereafter, in the ruling of 26<sup>th</sup> May 2025, the Court dismissed a series of applications aimed at undermining or delaying that determination. These included applications for stay of proceedings, removal of administrators and injunctive relief. The Court found that these applications were not grounded in bona fide legal grievances but were calculated procedural devices intended to stall the conclusion of the succession process. The ruling of 25<sup>th</sup> July 2025 addressed an eleventh-hour attempt to dispute the paternity of five beneficiaries from the second house. In rejecting that challenge, the Court invoked the doctrine of judicial estoppel, holding that the applicants could not be permitted to resile from their own prior representations which had, over the course of the proceedings, led the Court to consistently recognize those individuals as lawful beneficiaries of the estate. Taken together, these rulings disclose a troubling pattern in which certain beneficiaries have persistently misused court processes to retain de facto control over estate assets while effectively excluding others from their lawful entitlement. This conduct has converted what ought to have been a relatively straightforward succession cause into protracted and adversarial litigation, serving no legitimate end and resulting in an unjustified depletion of both judicial time and the family's estate.
31. I take note that most recently, in the judgement dated 17<sup>th</sup> day of September 2025, this Honourable Court distributed the estate and granted a partial Certificate of Confirmation of Grant which decision the Applicants herein appealed to the Court of Appeal vide Civil Appeal No E083 of 2025.
32. Abuse of the court's process is not confined to situations of bad faith alone. It includes the improper use of the court's procedures in a manner that is vexatious, oppressive or calculated to achieve collateral purposes outside the legitimate scope of the proceedings. In terms of section 1A, 1(B), 3 & 3A of the *Civil Procedure Act* and also under Rule 73(1) of the Probate and Administration Rules, the legislative framework is such a power entitles any such court exercising jurisdiction can invoke the inherent powers to do any of the following scheme of things;
- a. It is to ensure convenience and fairness in the legal proceedings.
  - b. It is to prevent steps being taken that will render judicial proceedings prejudicial or likely to occasion an injustice.



- c. It is to prevent abuses of legal processes
  - d. It is the power to correct, vary or extend and or order the proceedings to prevent injustice.
  - e. It is also the judicial power to decide the manner in which the court will decide upon a subject matter, more particularly the subordinate courts and inferior tribunals.
33. The Learned authors of Bullen & Leake & Jacobs [18<sup>th</sup> Edition] provide some guidance in this regard. They make the following observation at page 148 of their book;
- “The term “abuse of process of the Court” is a term of great significance. It connotes that the process of the court must be carried out properly honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings ‘although it should not be lightly done, yet it may often be required by the very essence of justice to be done.’”
34. In addition, the Black’s Law Dictionary defines abuse as everything which is contrary to good order as established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing, or to employ such a thing in a manner which is contrary to the natural legal rules for its use. The Court in the case of *Amaefule & Other Vs The State (1998) 4SCNJ 69* was emphatic on what constitutes the abuse of Judicial process as follows: -
- “as a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”
35. In the persuasive authority of *Okorodudu Vs Okorodudu (1977) 3SC21 & Oyebola Vs Eso West African Inc (1966) 1 ALL NLR 170* the court stated;
- “Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of right per se. the abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.....Essentially, is the inconvenience inequities involved in the aims and purposes of the application which constitute the abuse. Otherwise, when there is a right to bring an action, the state of mind of the person exercising the right cannot affect the rapidity or propriety of the exercise.”
36. The Applicants were fully aware, at the time of filing the present Application, that they had already lodged an appeal in the Court of Appeal and that the appellate process was actively underway. They had also sought substantive relief in that forum, including an order for stay of execution of the judgment. Despite this, they elected to file the present Application seeking leave to appeal from this Court, without candid disclosure of the procedural impossibility and duplication inherent in that course of action. The result is a parallel process that serves no purpose other than to delay the implementation of the judgment and to keep the estate in perpetual limbo. Succession matters, by their nature, demand finality and expedition. Prolonged litigation not only erodes estate value but also deepens familial



conflict and prejudice to beneficiaries who are entitled to enjoy the fruits of a lawful distribution. Courts must be astute to guard against procedural maneuvers that undermine these objectives.

**Whether the Further Affidavit dated 26<sup>th</sup> January 2026 and Written Submissions dated 30<sup>th</sup> December 2025 are properly before this Court?**

37. I take note that the 1<sup>st</sup> Applicant/Appellant proceeded to file written submissions dated 30<sup>th</sup> December 2025 and a Further Affidavit sworn on 26<sup>th</sup> January 2026. While the Court has perused the said pleadings, it is necessary to restate the settled legal position governing the jurisdiction of this Court at this stage of the proceedings. This Court rendered its final judgment in this intestate Succession Cause on 17<sup>th</sup> September 2025. Upon delivery of that judgment and save for matters permitted by law such as correction of clerical or arithmetical errors, review within the strict confines of the applicable legal framework or enforcement, this Court became functus officio. The doctrine of functus officio, which is rooted in the principle of finality of litigation, bars a court from re-opening, re-hearing or re-determining issues that it has already conclusively decided. This principle is essential to the orderly administration of justice, as it preserves certainty in judicial decisions and prevents parallel or duplicative adjudication.
38. More importantly, it is not in dispute that the 1<sup>st</sup> Applicant/Appellant has already invoked the appellate jurisdiction of the Court of Appeal by filing Civil Appeal No. E083 of 2025, challenging the judgment of this Court dated 17<sup>th</sup> September 2025. By that act, jurisdiction over all matters touching on the merits, legality, propriety and correctness of the impugned judgment shifted to the Court of Appeal pursuant to Article 164 of *the Constitution* and the *Appellate Jurisdiction Act*. In that context, the issues now raised in the Further Affidavit and the written submissions whether framed as grievances, clarifications or supplementary arguments are in substance matters that invite this Court to revisit its own judgment or to express views on issues that fall squarely within the jurisdiction of the appellate court.
39. It is trite law that jurisdiction flows from either a Statute or *the Constitution*, and no court assumes jurisdiction on its own. In the case of Owners of Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Ltd (1989) eKLR, the Court held that;
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
40. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -
- A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.



It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

41. From the above, this Court lacks jurisdiction to entertain or pronounce itself on such matters. To do so would not only offend the doctrine of *functus officio*, but would also risk usurping the constitutionally vested mandate of the Court of Appeal. Accordingly, this Court finds that the Further Affidavit sworn on 26<sup>th</sup> January 2026 and the written submissions dated 30<sup>th</sup> December 2025, to the extent that they seek to challenge, supplement or re-argue the merits of the judgment delivered on 17<sup>th</sup> September 2025, are misplaced before this forum. Those issues can only be properly canvassed, interrogated and determined by the Court of Appeal in Civil Appeal No. E083 of 2025, which is the court seized of the requisite jurisdiction.
42. I dare say that application is *res-judicata*. It is a re-litigation by the Applicant and the doctrine so applies regardless of the constitutional provision in Article 159 on the conceptual framework of substantial justice. This to me is having one bite at the cherry twice.
43. In the circumstances of this case, this Honourable Court is satisfied that the present Application is misconceived, unnecessary and calculated to obstruct or delay the due execution of the judgment. It therefore amounts to an abuse of the court process. In light of the foregoing, the following orders shall abide;
  - a. That the Notice of Motion Application dated 2<sup>nd</sup> December 2025 is hereby dismissed in its entirety for being an abuse of the Court process and this Court being *functus officio*.
  - b. The prayer for leave to appeal to the Court of Appeal be and is hereby declined.
  - c. That a declaration be and is hereby issued that the Applicants Further Affidavit dated 26<sup>th</sup> January 2026 and the Written Submissions dated 30<sup>th</sup> December 2025 are non-suited in this proceedings.
  - d. There shall be no order as to the costs.
44. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 9<sup>TH</sup> DAY OF FEBRUARY 2026**

.....

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

