

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
SUCCESSION CAUSE NO. 39 OF 2010

**IN THE MATTER OF THE ESTATE OF THE LATE JOSHUA A.
MORIT ALIAS MORIT ARAP TEMUGE (DECEASED)**

SAMUEL RUTO.....1ST
PETITIONER/APPLICANT

TIMOTHY KIPTOO ARAP RUTO.....2ND
PETITIONER/APPLICANT

VERSUS

ALICE

CHEPWOGEN.....PROTESTOR/RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion application dated 23rd June 2025, filed by the Petitioners/Applicants, **Samuel Ruto** and **Timothy Kiptoo Arap Ruto**. The application is brought under Order 42 Rule 6, Order 51 Rule 1, and Order 9 Rule 9 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.

2. The Applicants seek the following orders ***inter alia***:-

(a) THAT this Honourable Court do issue leave in order for the

firm of M/s Luyali Alumasa & Company Advocates to be

(b) THAT pending the hearing and determination of the appeal,

the court be pleased to issue a stay of execution of the judgment and/or decree of this Honourable court issued on

29th May 2025 and/ or any further proceedings of this matter.

(c) THAT costs for the application be provided for.

3. The application is supported by the grounds set out on its face and the facts deponed in the Supporting Affidavit and the Further Affidavit of Samuel Ruto sworn on 23rd June 2025, and on 12th August 2025, respectively plus the Applicants' Written Submissions. The application is opposed by the Respondent/Protestor, Alice Chepwogen, who filed a Replying Affidavit she sworn on 8th August 2025. The Respondent also filed Written Submissions dated 19th September 2025.

4. This Succession Cause concerns the estate of the late Joshua A. Morit alias Morit Arap Temuge (hereinafter "the Deceased"). The dispute over the mode of distribution protracted. On 29th May 2025, this Court delivered a judgment in which it considered the Summons for Confirmation of Grant dated 17th September 2021. The court evaluated the competing proposals for distribution: one advanced by the Petitioners (now Applicants) and the other by the Protestor (now Respondent). After a full hearing, the court was persuaded by the Protestor's mode of distribution and dismissed that of the Petitioners.

5. Being aggrieved by that decision, the Petitioners initiated the process of appealing to the Court of Appeal. They filed a Notice of

Appeal dated 11th June 2025 and have since lodged a substantive appeal at the Nakuru Court of Appeal, being Nakuru Court of Appeal Civil Appeal No. E120 of 2025. A Record of Appeal has been filed, and the appeal is pending pretrial directions.

6. The Applicants have now approach this court, seeking for orders to stay the execution of the judgment of 29th May 2025 pending the hearing and determination of that appeal. Their primary concern is that if the judgment is executed and the estate land is subdivided and distributed according to the Protestor's mode, the land will be irrecoverably alienated, rendering their appeal nugatory.

7. The Applicants' case is built on several pillars, as gleaned from their affidavits and written submissions.

8. First, they contend that they have an arguable appeal. They rely heavily on their Memorandum of Appeal, which raises the following core grievances;

- ***That the learned trial Judge erred by allowing the Protestor's mode of distribution contrary to the wishes of the Deceased.***

- ***That the Judge failed to consider the Deceased's written directions or wishes, which were allegedly expressed in a letter.***

- ***That the Judge failed to consider that the beneficiaries had settled and developed the land since 1986 in accordance with the Deceased's wishes.***

· ***That the Judge ignored the Applicants' documents and submissions on record.***

· ***That the Protestor was present when the Deceased allegedly made his wishes known and did not object at the time.***

· ***That the Protestor is married and is a beneficiary under her husband's inheritance, a factor the Judge allegedly failed to consider.***

9. The Applicants argue that these are serious questions of law and fact deserving of ventilation before the appellate court. They rely on the principle in ***Butt v Rent Restriction Tribunal [1982] KLR***, which emphasizes that a court should exercise its discretion to ensure that a successful appeal is not rendered nugatory.

10. Secondly, on the issue of substantial loss, the Applicants argue that the estate comprises immovable property. They submit that land is unique and irreplaceable. If a stay is not granted and the judgment is executed, the land will be subdivided, transferred to beneficiaries, and potentially sold to third parties. They contend that once this happens, the property cannot be recovered, and the appeal, even if successful, would be rendered as an academic exercise. They rely on ***RWW v EKW [2019] eKLR and Tengeya v Mogoba & 2 others [2025] KEELC 5590 (KLR)*** for the proposition that the purpose of a stay is to preserve the subject matter of the appeal.

11. Thirdly, the Applicants submit that the application was filed without unreasonable delay. The judgment was delivered on 29th May 2025, and the application for stay was filed on 23rd June 2025, a period of less than one month. They argue this demonstrates promptitude and good faith.

12. Fourth, the Applicants have stated their willingness to provide security. In paragraph 14 of the Further Affidavit of Samuel Ruto, the deponent states: "The Appellants is ready, willing and able to abide by such reasonable stay terms as the court may order, in the interest of both parties."

13. Finally, the Applicants have, through their Further Affidavit, sought to counter the procedural objections raised by the Respondent. They exhibited documents demonstrating that the Notice of Appeal was filed, that court fees were paid, and that the appeal (Nakuru Court of Appeal Civil Appeal No. E120 of 2025) is now fully lodged and pending. They also stated that the Notice of Appeal was served upon the Respondent's advocates via email on 19th July 2025.

14. The Respondent opposed the application with equal vigor. Her case rests on both procedural and substantive grounds.

15. On the competence of the appeal; The Respondent argues that an appeal in succession matters is not automatic and requires leave of the High Court first. She relies on Section 50 of the Law of Succession Act and the case of ***Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR*** for the proposition that an appeal filed without

leave is incompetent and a nullity. She contends that since no leave was sought or obtained, the purported appeal before the Court of Appeal is a nullity, and there is, therefore, no valid appeal to anchor an application for stay.

16. On procedural defects; the Respondent points to several defects in the Notice of Appeal. First, she notes that the Notice erroneously describes the Appellants as "the Protester herein," which she argues is a fundamental error. Second, she claims that the Notice of Appeal does not bear the stamp of the Deputy Registrar, offending Rule 77 of the Court of Appeal Rules and casting doubt on whether it was properly lodged. Third, she argues that the Notice of Appeal was not served upon her within the mandatory seven days required under Rule 79 of the Court of Appeal Rules. She states that service was only effected on 19th July 2025, over a month after filing, and that the existence of the appeal only came to her attention upon the filing of this application.

17. On the merits of the stay application; the Respondent argues that the Applicants have failed to meet the threshold for the grant of a stay. Relying on ***Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] KLR 410*** and ***Machira t/a Machira & Co Advocates v East African Standard (No. 2) [2002] KLR 63***, she submits that the Applicants have not demonstrated the substantial loss to the required standard. She contends that the mere fact that the subject matter is land does not, without more, constitute substantial loss.

18. On abuse of process, the Respondent argues that the application is a delaying tactic meant to frustrate her from enjoying the fruits of her judgment. She deposed that the 1st Applicant informed her that they would ensure she never gets the land and that they have no intention of prosecuting the appeal. She asks this court to dismiss the application and allow the distribution to proceed.

19. The principles governing the grant of an order for stay of execution pending appeal are well settled. They are derived from Order 42 Rule 6(2) of the Civil Procedure Rules, which provides;

"No order for stay of execution shall be made under subrule (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."

20. The Court of Appeal in ***Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] KLR 410*** emphasized that a stay should not be granted lightly, as it deprives a successful litigant of the fruits of their judgment. The applicant must lay a proper basis for the court's discretion to be exercised in their favor.

21. The Applicants argue that because the subject matter is land, substantial loss is automatic. While it is true that land is unique

and its alienation can render an appeal nugatory, this principle applies only where there is a competent appeal. The purpose of a stay is to preserve the subject matter of an appeal that has a chance of success. It would be an abdication of judicial responsibility to preserve property for an appeal that is incompetent.

22. To grant an order for stay in the circumstances would be to use the court's process to delay the inevitable and to frustrate a successful litigant from enjoying the fruits of her judgment. This court will not lend itself to such an outcome.

23. This Court acknowledges that the instant application was filed without unreasonable delay and that the Applicants have expressed their willingness to provide security. However, these factors alone cannot salvage an application for stay when the underlying appeal is incompetent.

24. The Applicants' failure to seek leave to appeal to the Court of Appeal in a succession matter is particularly significant. While the Court of Appeal has inherent jurisdiction, the requirements of Section 50 of the Law of Succession Act cannot be ignored. An appeal commenced without leave is, at best, irregular.

25. Prayer (b) of the application seeks leave for the firm of M/s Luyali Alumasa & Company Advocates to come on record after judgment. Order 9 Rule 9 of the Civil Procedure Rules requires such leave to ensure clarity on representation. This prayer is procedural and has not been opposed by the Respondent. It is accordingly allowed.

26. In the end, the motion dated 23rd June, 2025 is substantially found to be without merit. The same is dismissed save that leave is granted to the Firm of M/s Luyali Alumasa & Co., Advocates is allowed to come on record for the Petitioners/Applicants after Judgment. Each party to bear their own costs.

**Dated, signed and delivered at Kericho this 10th day
of March, 2026.**

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**J. K. SERGON
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Nabei for Petitioner

Okok for the Protestor