REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. E76 OF 2021

IN THE MATTER OF THE ESTATE OF CHELAGAT CHEBASA RIBINSON *alias* CHELAGAT CHEBASA (DECEASED)

MARIA JEBET ARAP MASOIN……..1ST PETITIONER/OBJECTOR
KIPKEMBOI EMMANUEL TOROITICH……2ND PETITIONER/OBJECTOR
RICHARD KIPROTICH SAWE…….....3RD OBJECTOR

VERSUS

KIPKOECH LAGAT.....1ST ADMINISTRATOR
TOROITICH LAGAT.....2ND ADMINISTRATOR

RULING

1. There are two Applications the subject of this Ruling, both arising from the Judgment I delivered herein on 9/05/2025.

2. In the Judgment, I basically found that the Objectors failed to prove their claims of being beneficiaries to the estate of the deceased herein, **Chelagat Chebasa Ribinson**, or being dependents of the deceased immediately prior to his death, and are not therefore entitled to inherit from the estate. I however also ordered that there being no dispute that the Objectors have been in long occupation of about 4-5 acres aggregate portion of the estate land falling either on the parcel of land known as **Cheptiret/Cheplaskei/Block 1 (Kipchamo)/58**, or on **Cheptiret/Cheplaskei/Block 1 (Kipchamo)/59**, on which they also live and cultivate together with their families, such portion of land shall be retained jointly by them, thus the same shall be carved out and title(s) be issued to the Objectors.

3. I ordered further that the said 4-5 acres (approximately) allocated to the Objectors, the rest of the estate shall be distributed between the 1st and 2nd Administrator. I then gave the parties the opportunity to amicably identify the exact area (approximately 4-5 acres) now allocated to the Objectors and which shall be carved out and title(s) issued to them as aforesaid, and to enable the Administrators to also agree on the manner of distribution of the rest of the estate as between the two of them, I referred the matter to Court Annexed Mediation for that purpose, with the rider that if after the 60 days Court Annexed Mediation window, the parties are unable to reach a settlement, and no extension is granted, the Court shall proceed to rule on the said matters.

4. The first Application is the Summons dated 4/11/2025 filed by the Administrators. The same is filed through **Messrs Bundotich Korir & Co. Advocates**, and seeks orders as follows:

i) [Spent]

ii) **THAT** the Court do direct and/or order for further distribution of the estate as set out in the Affidavit of **Kipkoech Lagat**.

iii) **THAT** a Certificate of Confirmation of Grant do issue as per Clause 8 of the Supporting Affidavit of **Kipkoech Lagat**.

5. The Application is supported by the Affidavit sworn by the 1st Administrator, **Kipkoech Lagat**, who deponed that pursuant to the said Judgment, to implement the order allocating the Objectors the 4-5 acres (approximately) occupied by the Objectors to be carved out and tiles issued, a Surveyor has since ascertained that the portion measures 4 acres which the Administrators are ready to have excised in favour of the Objectors. He deponed further that regarding the second limb of the Judgment, the Administrators had also since agreed on the mode of distribution of the rest of the estate that all parties shall get their share from the parcels of land mentioned above and that they had also included other beneficiaries who are children of their late brothers who, as such, also ought to get shares. He then exhibited the Surveyor's sketch and the proposed schedule of distribution.

6. The second Application is the Notice of Motion dated 19/01/2026 filed by the Objectors, and filed through **Messrs Kutto & Kaira Nabasenge Advocates**. The remaining prayers are basically as follows:

"……..

e) That the Honourable Court be pleased to suspend all the dealings in respect of the land parcels registration numbers **Cheptiret/Cheptiret Block 1 (Kichamo) 58** measuring approximately 17.818 Ha. (44 acres), and **Cheptiret/Cheptiret Block 1 (Kichamo) 59** measuring approximately 9.16 Ha. (22 acres) comprised in the deceased estate in the interest of the doctrine of Lis pendens pending the hearing and determination of the Appeal bearing in mind that this matter is active before the Court of Appeal, being **Eldoret Court of Appeal, Civil Appeal No. E053 of 2025** which Appeal has been certified urgent

f) **THAT** in the alternative and without prejudice to prayer (e) above, the Honourable Court be pleased to direct that the subdivisions of the land parcels numbers **Cheptiret/Cheptiret Block 1 (Kichamo) 58** measuring approximately 17.818 Ha. (44 acres), and **Cheptiret/Cheptiret Block 1 (Kichamo) 59** measuring approximately 9.16 Ha. (22 acres) comprised in the deceased estate if any, must be carried out by County (District)/Government Surveyor in accordance with the Judgment of this Honourable Court dated 9th May 2025.

g) That in view of prayer (f) above the Honourable Court be pleased to direct that in carrying out the said subdivisions in accordance with the Judgment of this Honourable Court dated 9th May 2025, the Government Surveyor must consider the possession, occupation and location of the Applicants, **Maria Jebet Arap Masoin**, **Kipkemboi Emmanuel Toroitich** and **Kiprotich Richard Sawe** so as not to interfere with their developments/homesteads and right of easement.

h) The Applicants be awarded costs of this Application."

7. The Application is supported by the unnecessarily lengthy Affidavit sworn jointly by the 3 Objectors who deponed that around 18/12/2025, the Administrators engaged private Surveyors to carry out illegal subdivisions of the said parcels of land contrary to the said Judgment in which Survey, 3rd parties who are not beneficiaries of the deceased have been allocated land. The also deponed that the said survey took place despite the pendency of an Application for stay at the Court of Appeal, and despite the Administrators having filed an Application seeking permission from this Court to effect the said illegal subdivisions, and also ignores the fact that the Objectors were in the Judgment, allocated a portion measuring 4-5 acres because the Surveyors and the Administrators caused damage to the Objectors' houses erected in that portion, fenced off the portion, and denied the Objectors' access to their homesteads and

8. The 1st Application (seeking further distribution of the estate), has been opposed by way of the Objectors' Notice of Preliminary Objection dated 18/11/2025, and the Replying Affidavit jointly sworn by Objectors on 1/12/2025.

9. In the Notice of Preliminary Objection, it was urged that the Application is disguised as one seeking to enforce the Judgment of the Court but in essence seeks review of the Judgment, the Application offends the provisions of **Section 80** of the **Civil Procedure Act** since there is already an appeal pending before the Court of Appeal, and that the Application offends the

provisions of **Section 26 and 27** of the **Law of Succession Act** as the same introduces third parties who are not dependents/beneficiaries of the estate of the deceased.

10. In the Replying Affidavit, the Objectors deponed that the said Judgment was not conclusive since it did not conclusively distribute the estate amongst the beneficiaries and this is the ground of Appeal that is pending before the Court of Appeal. It was also contended that the matter is sub-judice as it is active before the Court of Appeal. The rest of the matters deponed are basically repetitions of matters already set out above.

11. The 2nd Application (seeking suspension of all dealings in respect to the said parcels of land), has been opposed by way of the Administrators' Notice of Preliminary Objection dated 18/11/2025, and the Replying Affidavit jointly sworn by Objectors on 1/12/2025.

12. In the Notice of Preliminary Objection, it was urged that the Court lacks jurisdiction to entertain the Application, and that it offends provisions of **Section 82** of the **Law of Succession Act**, which provides that it is the personal representative who has powers to enforce, all causes of action which survive the deceased. It was contended further that the Application is frivolous, the Objectors having filed a similar Application but withdrew it, and that the Application is sub-judice in view of pendency of a similar Application seeking same orders before the Court of Appeal.

13. The parties then filed written Submissions the length whereof I strictly limited noting the straightforwardness of the matters in issue. The Administrators Submissions is dated 29/01/2026, while the Objectors' is dated 2/01/2026.

Determination

14. The issues that arise for determination in this matter are basically twofold, as follows:

i) **Whether the Administrators should be permitted, in pursuit of enforcing the Judgment delivered herein, to proceed with a survey process whose effect will be to allocate portions of the estate to persons who were not named in the Judgment as beneficiaries.**

ii) **Whether the Court should, pending hearing and determination of an Appeal, issue an order suspending all dealings with the two parcels of land comprising the estate pending Appeal.**

15. Regarding the first issue, I agree with **Mr. Nabasenge** that the Administrators' Application crafted as seeking further distribution of the estate, though disguised as one seeking to enforce the Judgment herein, it is in essence seeks review and/or variation of the Judgment. I would only allow such Application in a case where the parties agree to it by consent, not where the same is contested. In my Judgment delivered on 9/05/2025, my express order was that the remainder of the parcels of land was to be shared between the 2 Administrators and they were to return to Court with their proposal on how they had agreed to share it as between the two of them. I am now informed that within their share, they wish to allocate part thereof to persons whom they have described as children of their late brothers. I appreciate that if this description is true, then it will save costs and time to include such late brothers' children in the distribution at this stage. However, I will not allow that route to be taken in this case because there is no explanation why no such proposal was not made when this matter proceeded to ***viva voce*** trial in which the litigants were all granted the opportunity to testify. Why now belatedly?

16. Secondly, the Objectors having not confirmed that indeed the persons proposed by the Administrators are really the children of the Administrators' late brothers, I have no way of independently verifying that fact. I therefore have no way to verify that I am not being asked to distribute the estate to strangers. I also have no way of verifying whether there are other members of the families of the alleged late brothers and if so, whether they have all consented to the proposal to allocate the said portions to only the 3 persons proposed by the Administrators. Having already delivered Judgment in this matter, this Court is basically now ***functus officio*** and I will not want to re-open litigation which will introduce arguments on fresh uncontested matters not raised at the trial. If the Administrators wish to donate parts of their share to third parties post-Judgment, then the safest option, to avoid controversies, is for them to wait to first be formally allocated those shares then they can subsequently, as legal and registered proprietors, transfer the same to the proposed third parties. Considering the heated nature of this case, and there being matters still pending before the Court of Appeal, I will not at this late stage, after concluding the case by delivering a full and final Judgment, re-open litigation on factual contested matters that will therefore have to again be need to be verified by receiving fresh facts.

17. In any case, regarding the 4-5 acres (approximately) that I allocated to the Objectors, I issued self-regulating directions in terms that to give the parties the opportunity to amicably identify the exact area (approximately 4-5 acres) so allocated to the Objectors, I referred the matter to Court Annexed Mediation for that purpose, with the rider that if after 60 days, the

parties are still unable to reach a settlement, and no extension is granted, the Court shall proceed to rule on the same. The parties have, to date, not gone to the Mediation as the Objector intends to Appeal, and no amicable settlement thereon has been presented to the Court. This therefore means that what the parties were required to do was to return to Court and move it to identify the exact area (approximately 4-5 acres) that is to be so allocated to the Objectors. The Objectors now allege that the Administrators have, contrary to the self-regulating mechanism cited above, proceeded to carry out a survey which has affected even the portions currently occupied by the Objectors and fenced them off thus denying the Objectors access to their homesteads. **If true**, then it means that the Administrators have breached the clear directions given in the Judgment. This, **if true**, is wrong and unacceptable, and the earlier the Administrators undo the fencing off and blockage of access to the Objectors' homesteads, the better for them otherwise they risk attracting a finding of being in contempt of Court.

18. Regarding the second issue, although the prayer made in the 2nd Application has been crafted to read that it seeks "***to suspend all the dealings in respect of the land parcels …… pending the hearing and determination of the Appeal***", this, too, is simply a disguise meant to hide the fact that it is also, for all intents and purposes, an Application for stay of execution pending Appeal. I will therefore treat it as such.

19. As admitted by the Objectors, themselves, they already have a pending Application before the Court of Appeal expressly seeking an order of stay of execution. Although no copy of the Application has been exhibited, the Objectors have presented a copy of a Notice from the Court of Appeal confirming existence of that Application. It is basic case of procedure that once an Application for a stay of execution pending appeal is filed before an appellate Court (the Court of Appeal in this case), a similar or parallel Application, generally, cannot again, still co-exist before the trial Court (the High Court in this case) generally. While both Courts no doubt have jurisdiction to grant an order for stay, the policy and also common-sense dictates that in the event of there being two such parallel Applications seeking stay, the one pending before the higher Court should take preference. Filing of parallel Applications is unacceptable since, apart from being a clear abuse of the Court process, also amounts to "window-shopping", which cannot be permitted or encouraged.

20. For the above reason, and having found that the instant Application is a disguised Application for stay of execution pending Appeal, the same cannot be properly before this

Court, and is thus liable for striking out. Nonetheless, I will, for completeness of the record, still interrogate the Application on its merits, which I now proceed to do.

21. Regarding stay of execution, **Rules 49** and **73** of the **Probate and Administration Rules**, read together, permit this Court to invoke its inherent jurisdiction to issue appropriate orders in order to meet the ends of justice and to prevent abuse of process. Read also with **Section 47** of the **Law of Succession Act**, the said provisions are wide enough to cover the prayer for stay of execution of an order made in Succession matters.

22. Stay of execution pending appeal is however a discretionary power but which, needless to state, must not be exercised on whims, but judiciously, on defined principles and on the basis of facts. It is also the position that the objective of stay of execution is to prevent "***substantial loss***" from befalling an Applicant, and thus to prevent the appeal from being rendered nugatory. An Applicant for stay of execution pending Appeal is required to satisfy the conditions that the Application has been made without unreasonable delay, that "***substantial loss***" may result to the Applicant unless the order is granted, and where applicable, that the Applicant is willing or ready to deposit security for due performance of the decree or order.

23. The first condition that I need to consider is therefore whether the Application herein has been made without unreasonable delay. In this case, the Ruling the subject of the Application was delivered on 9/05/2025. The instant Applications was then filed on or about 19/01/2026, thus almost 6 months later, and even so, clearly only as a reaction to the Administrators' above Application dated 4/01/2025. This delay, which is clearly inordinate, has not even been explained. This finding alone is therefore sufficient to dismiss the Application.

24. The second condition is whether the Objectors would suffer "***substantial loss***" should the order for stay not be granted. On what constitutes "***substantial loss***", **F. Gikonyo J** in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, stated as follows:

> **"11. 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, ……., 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, ….., emphasized the centrality of substantial loss thus:

> ***"… 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."***

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion …….. only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above." **[**Emphasis mine**]**

25. Further, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR**, expressed himself as follows:

> **"…….. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. ……..".**

26. On his part, **Gachuhi, Ag. JA (as he then was)** in the same case, stated that:

> **"……... What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement." [**Emphasis mine**]**

27. From the foregoing, it is clear that an Applicant for an order of stay of execution has the obligation to first demonstrate, as part of the limb of "***substantial loss***", that refusal by the Court to ***"preserve the status quo"*** will result into such loss that would ***"render the appeal nugatory"***, which in turn means that such Applicant must demonstrate that "***the appeal is not frivolous"*** and that it possesses some ***"reasonable belief that it may succeed"***.

28. On "***substantial loss***", the Objectors state that they will be "***prejudiced and consequently suffer irreparably***". This is however basically because of the allegation that the Administrators have carried out a flawed survey exercise in breach to the Judgment delivered herein by allocating portions of the estate parcels of the land to third parties not recognized in the Judgment, and that in doing so, the Administrators have trespassed into the portions allocated to the Objectors and fenced it off. On the issue that the Administrators have carried out a flawed survey, that grievance, even if genuine, cannot be cured by issuing an order of stay of execution. If the survey has already been conducted, how will an order of stay assist? That has to be tackled by a different procedure and appropriate orders sought. Regarding the allegation that the Administrators have introduced unknown third parties in the distribution of the estate, I have already declined to permit the Administrators to do so and declared that survey as irregular. Under these circumstances, it is clear that the "***prejudice"*** and the alleged fear by the Objectors to ***"consequently … suffer irreparably"*** are no longer in existence.

29. In any case, even if there was valid fear of a wrongdoing that may be done by the Administrators, it has not been demonstrated that such wrongful act cannot be undone or cured should the Objectors succeed at the Court of Appeal. There is therefore no demonstration that the Appeal would be rendered "***nugatory***" if the order of stay pending appeal is not granted. Although, I agree, execution may cause some inconvenience to the Objectors, I do not think that such inconvenience would amount to rendering the Appeal "***nugatory***".

30. I have also considered that the deceased herein died way back in the year 1998, which means that his family and beneficiaries have waited for not less that 28 years now for conclusion of this matter. Under these circumstances, my view is that it will be most unjust for a Court of law to perpetuate this apparent "injustice" against the family any further by staying the orders made herein after the matter has now been concluded.

31. Having found that no "***substantial loss***" to be suffered has been demonstrated, and also that the Appeal will not be rendered nugatory if the order of stay is not granted, consideration of the third condition - deposit of security - does not now arise.

32. In the circumstances, after carefully weighing and balancing the competing interests of the protagonists herein, I find that the prayer for stay of execution must fail as the scales of justice clearly tilt towards denying the prayer.

Final orders

33. The upshot of my findings is that I rule and order as follows:

i) Both the Summons dated 4/11/2025 and 19/01/2026, respectively, are hereby dismissed.

ii) The Administrators are however reminded that distribution of the estate or subdivision of the parcels of land comprising the estate of the deceased herein must at all times be carried out or conducted strictly in accordance with the declarations made and directions given in the Judgment delivered herein on 9/05/2025.

iii) Consequently, no new parties or alleged beneficiaries not named or recognized in the Judgment shall be introduced or included in the distribution post-Judgment.

iv) The Administrators are at liberty to present a fresh schedule of distribution that aligns with the Judgment, and thus excluding any new parties or alleged beneficiaries not named or recognized therein.

v) Any land survey carried out before complying with the directions given in the Judgment delivered on 9/05/2025 that the parties move the Court to adopt any amicable settlement agreement reached by the parties on distribution of the estate in accordance with the declarations made in the Judgment, and also to determine or identify the exact area (approximately 4-5 acres) that the Court did allocate to the Objectors in the Judgment upon lapse of 60 days as expressly stated in the Judgment, is premature, unilateral, irregular and invalid as the same will have been carried out before final distribution of the estate by the Court, and before directions and modalities of carrying out the land survey has been given by the Court.

vi) Consequently, if any such land survey has been carried out and portions of land fenced off, or the Objectors' access to their homesteads blocked or frustrated as a consequence, as alleged by the Objectors, such acts are invalid and in breach of the Judgment delivered herein on 9/05/2025, and must be fully undone, including removing such fencing, **within twenty-one (21) days** from the date hereof.

vii) Each party shall bear his own costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF FEBRUARY 2026

……
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Korir for the Administrators

N/A for the Petitioners/Objectors

Court Assistant: Brian Kimathi