

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION CAUSE NO. E042 OF 2022
IN THE MATTER OF THE LATE LABAN KIBIRIR CHELASHAW
(DECEASED) THROUGH

W.K.B ARAP CHELASHAW	1ST
PETITIONER		
EDWARD KIPTOO CHELASHAW	2ND
PETITIONER/APPLICANT		
THOMAS KIPKURUI CHELASHAW	3RD
PETITIONER		
BETWEL KIPKEMEI CHELASHAW	4TH
PETITIONER		

Coram: Before Justice R. Nyakundi
M/s Kalya & Company Advocates
M/s Z.K. Yego Law Offices
M/s Limo R.K. & Company Advocates

RULING

1. There are three pending applications before this honorable court arising from the administration of the estate of the late Laban Kibirir Chelashaw (the Deceased). The parties before this court are the four sons of the Deceased, all of whom were appointed co-administrators of the estate. A Grant of Letters of Administration Intestate was issued on 29th June 2022. The principal assets of the estate include land parcel Kitale Municipality/Koitogos/154 measuring 14.42 Ha and land parcel Uasin Gishu/Timboroa/18.
2. The 2nd petitioner's application dated 16th October, 2025, which came in first seeks orders as follows:

- a. *Spent.*
 - b. *THAT the Administrators be compelled to sign and execute all necessary documents including transfer forms to facilitate the transmission and registration of the deceased's property known as KITALE MUNICIPALITY/KOITOGOS/154 measuring 14.42 Ha in favour of the Applicant as a beneficiary.*
 - c. THAT the administrators have not demonstrated the necessary commitment to facilitate the conclusion of the distribution process as per the confirmed grant.
 - d. That in default of compliance within a specified period, the Deputy Registrar of this Honourable Court be authorized to sign the said documents on behalf of the Respondents.
 - e. That the costs of this application be provided for.
- 3.** The application is grounded on various grounds, among them being that 9 acres out of Kitale Municipality/Koitogos/154 measuring 14.42 Ha was allocated to the Applicant/Beneficiary. That 9 acres out of Kitale Municipality/Koitogos/154 measuring 14.42 Ha was allocated to the Applicant/Beneficiaries and that the Administrators have, without any justifiable reason, failed and/or refused to execute the necessary transfer documents to give effect to the confirmed grant.
- 4.** The second application is dated 26th November, 2025 in which the 3rd and 4th Petitioners seek orders that:
- a. *Spent.*
 - b. *That leave be granted to the Applicants to appeal against the ruling delivered on 30th January 2025.*
 - c. *That pending the hearing and determination of this application interpartes, and upon grant of leave to appeal, a stay of execution of the ruling delivered on 30th January 2025 and the Certificate of Confirmation of Grant issued on 7th February 2025 be issued.*

- d. That pending the hearing and determination of the intended appeal, an order of temporary injunction be and is hereby issued restraining the Respondents by themselves, their agents, servants or assigns from taking possession, subdividing, evicting the Applicants or dealing with the property namely Kitale Municipality/Koitogos/154 and Uasin Gishu/Timboroa/18 in any manner.*
- e. That pending the hearing and determination of this application interpartes, the status quo prevailing on land parcel numbers Kitale Municipality/Koitogos/154 and Uasin Gishu/Timboroa/18 as at 24th November 2025 be maintained.*
- 5.** The application is anchored on grounds that:
- a. That the ruling delivered on 30th January 2025 aggrieves the Applicants who are beneficiaries of the estate of the late Laban Kibirir Chelashaw (Deceased) and thus have filed a Notice of Appeal against the said ruling.
 - b. That the Applicants inadvertently failed to file an application for leave to appeal before seeking audience in the Court of Appeal, hence the delay in filing the application herein.
 - c. That the Honorable Court rendered itself against the Applicants by dismissing the consent of the parties allowing the application for review dated 11th June 2024, and upholding the Respondent's summons for distribution.
 - d. That the Applicants and other beneficiaries of the estate shall suffer substantial loss if the stay of execution of the judgment delivered on 20th May 2024 and ruling delivered on 30th January 2025 herein is not granted.
 - e. That the execution of the judgment delivered on 20th May 2024 and ruling delivered on 30th January 2025 is on course as the 2nd Respondent vide application dated 16th October 2025 seeks to

execute the decision of this Honorable Court, in essence evicting the Applicants from the only place they call home.

- f. That the Applicants require leave of the Honorable Court to prosecute their appeal, already filed vide Notice of Appeal dated 31st January 2025, lodged on 6th February 2025.

Replying Affidavits.

6. Two replying affidavits were filed in opposition to this application.
7. The 1st Petitioner/Respondent, W.K.B. Arap Chelashaw, filed a Replying Affidavit deposing that the application is devoid of merit and has been brought under inordinate delay. He avers that the estate of the Deceased has been fully demarcated and surveyed pursuant to the confirmed grant, and that all beneficiaries are presently in occupation of their respective portions, annexing copies of the mutation forms in support. He further deposes that the distribution was equal among all the beneficiaries, that the Applicants have not demonstrated any arguable ground warranting leave or stay, and that the prayer for stay has in any event been overtaken by events given that implementation of the grant is complete. He characterizes the application as driven by greed, the Applicants seeking a larger portion without justifiable cause. He further filed a supplementary affidavit attaching a copy of the survey plan for Timboroa Settlement Scheme/18 arising from enforcement of the confirmed grant.
8. The 2nd Petitioner/Respondent, Edward Kiptoo Chelashaw, filed a detailed Replying Affidavit through his Advocates, setting out a comprehensive account of the implementation of the confirmed grant. He confirms that each of the four beneficiaries being himself, Thomas Kipkurui Chelashaw, Philip Kipkemoi Chelashaw and Isaiah Kibiwott Birir was allocated 9 acres out of Kitale Municipality/Koitogos/154. He provided a detailed account of the cadastral survey conducted on 27th February 2025, confirming that the County Surveyor took full account

of all homesteads and permanent structures. Specifically, the homestead of the 3rd Petitioner/Applicant (Thomas Kipkurui Chelashaw) was fully preserved and his portion was adjusted into an L-shape so that none of his houses, buildings or compound were disturbed in any way. Similarly, the homestead of Isaiah Kibiwott Birir and the burial site of his late wife were preserved intact. He annexed the Return of Survey dated 3rd March 2025 and the subdivision plan prepared by the County Surveyor. The 2nd Petitioner further discloses that on 3rd June 2023 he was diagnosed with Amyotrophic Lateral Sclerosis (ALS), a progressive and terminal neurodegenerative disease causing loss of mobility, speech impairment, swallowing difficulties and respiratory decline, from which there is no recovery. He deposes that he is in an advanced stage of the disease and that any further delay in realizing the fruits of judgment effectively renders the Court's decision nugatory during his remaining lifetime.

Analysis and determination

9. I have carefully perused and considered the pleadings, the affidavit evidence, the written submissions filed and made by counsel for all parties, as well as the decisions cited therein. Two predominant issues emerge for determination, the resolution of which shall dispose of all the applications before this Court:
 - a. *Whether leave to appeal against the Ruling delivered on 30th January 2025 ought to be granted to the 3rd and 4th Petitioners;*
 - b. *Whether, consequent upon any grant of leave, a stay of execution of the said Ruling and of the Certificate of Confirmation of Grant issued on 7th February 2025 ought to issue;*

Whether leave to appeal ought to be granted

10. The question of whether leave is a prerequisite to filing an appeal from the High Court exercising original jurisdiction in succession matters

remains unsettled. A clear divide persists among practitioners, scholars, and commentators on this point. Those who take the view that leave is necessary advance two principal grounds in support of that position.

11. The first one was well captured in the case of **Rhoda Wairimu Karanja & another v 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.”*

12. The opposing school of thought draws from the Constitution of Kenya, 2010, which it contends guarantees an unrestricted right of appeal. On this view, any provision within the Law of Succession Act that conditions appeal on the grant of leave constitutes existing law and must therefore be treated in accordance with section 7(1) of the Sixth Schedule to the Constitution, which addresses transitional provisions.

13. The Court of Appeal recognized this dichotomy of opinion in the case of **Peter Wahome Kimotho v Josphine Mwiyeria Mwanu [2014] eKLR** the 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.”

- 14.** Instructive as the foregoing debate is, the more pressing inquiry for present purposes is what considerations a court ought to weigh when called upon to grant or refuse leave to appeal. Guidance on this point was furnished

by the Court of Appeal in **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR**, wherein the court stated as follows:

“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.”

- 15.** Applying that standard to the present matter, I am satisfied that the application for leave to appeal merits favorable consideration. The Ruling of 30th January 2025 made determinations of significance in the

administration of the estate, including the dismissal of the consent recorded between the parties in the application for review dated 11th June 2024 and the upholding of the Respondents' summons for distribution. These are matters that, at least prima facie, raise questions of law and judicial discretion that are deserving of appellate scrutiny. Accordingly, I will be inclined to grant that prayer.

Whether a stay of execution ought to issue

16. The grant of leave to appeal leads inevitably to a consideration of whether the execution of the Ruling of 30th January 2025 and the Certificate of Confirmation of Grant issued on 7th February 2025 ought to be stayed. The Court must balance two competing interests: on the one hand, the

right of other beneficiaries to enjoy the fruits of a confirmed grant, especially on the urgency by the 2nd petitioner's serious and terminal illness; and on the other hand, the right of the 3rd and 4th Petitioners not to be dispossessed of what they regard as their only home pending the appellate process.

17. In the case of **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)** where the Court of Appeal held: -

“A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”

- 18.** It is established law that for a stay to issue pending an appeal, the applicant must demonstrate that the appeal is arguable and not frivolous; that unless stay is granted the appeal, if successful, would be rendered nugatory; and that the balance of convenience favours a stay.
- 19.** Looking at the material before this Court wholesomely, I find that the 3rd and 4th Petitioners have met the threshold, having raised questions as outlined above. On the question of nugatory effect, the evidence of the 1st Respondent that the estate has already been demarcated and that beneficiaries are in occupation of their respective portions is a weighty consideration, as it suggests that the distribution is substantially complete. However, that completion cannot be an absolute bar to a stay where the appellate process remains live.
- 20.** The balance of convenience, in my view, tips in favour of a limited and conditional stay. A full and unconditional stay would deprive the 2nd Petitioner of the relief to which the confirmed grant entitles him, in circumstances where his medical condition lends particular urgency to expedition. That said, the overriding imperative of justice demands that the appellate process be accorded meaningful room to operate.
- 21.** On the facts before me, the survey has been concluded, the mutation forms prepared, and each beneficiary is presently in occupation of his respective portion. In those circumstances, maintaining the status quo as it existed at the date of this ruling adequately protects the legitimate interests of all parties it neither dispossesses the 3rd and 4th Petitioners of their homesteads, nor does it undo the cadastral work already completed. It simply holds the position steady while the appellate process runs its course.
- 22.** I am therefore satisfied that a stay of execution of the Ruling delivered on 30th January 2025 and the Certificate of Confirmation of Grant issued on 7th February 2025 is warranted, on the condition that the status quo prevailing on the suit properties namely Kitale

Municipality/Koitogos/154 and Uasin Gishu/Timboroa/18, be maintained pending the lodging, admission and hearing of the intended appeal, or until further orders of the Court of Appeal.

23. Accordingly, the following order do abide:

- a. *Leave to appeal against the Ruling delivered on 30th January 2025 is hereby granted to the 3rd and 4th Petitioners.*
- b. *A stay of execution of the Ruling delivered on 30th January 2025 and the Certificate of Confirmation of Grant issued on 7th February 2025 is granted until the Court of Appeal issues further directions.*
- c. *The status quo prevailing on land parcel numbers Kitale Municipality/Koitogos/154 and Uasin Gishu/Timboroa/18 as at the date of this Ruling shall be maintained pending the lodging, admission and hearing and determination of the intended appeal, or until further orders of the Court of Appeal.*
- d. *Status conference to monitor the progress of the appeal on 30th June 2026.*
- e. *Each party shall bear the costs of these applications.*

24. Orders accordingly.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 16TH DAY OF MARCH 2026.

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R. NYAKUNDI

JUDGE

